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We take pleasure in presenting to our readers the following unpublished opinion of the Hon. Caleb Cushing, Attorney-General of the United States, on the subject of

RIGHT OF BELLIGERENTS TO AN ASYLUM IN THE PORTS OF THE UNITED STATES.

Attorney-General's Office, 28 April, 1855.

Sir: — It appears by your communication of the 1st ult. that on the 25th of November last, a British man-of-war, the President, was lying in the Bay of San Francisco, in the State of California, wherein she had entered, accompanied with a Russian vessel, the "Sitka," alleged to be prize of war to said ship "President;" that on board the Sitka was a prize-crew, commanded by an officer of the British navy; that on the day aforesaid, a petition was presented to a competent judge of the State of California, in the name of one Nystrom and of one Blom, alleging that they were unlawfully confined and detained on board the Sitka by the prize-officer and crew thereof, and praying for the issue of a writ of *habeas corpus*, directed to such prize-officer and crew, for the purpose of having the legality of such confinement and detention inquired into, according to the laws of the State; that the court thereupon granted the writ, which was duly served by manual delivery of copy to the officer in command of the Sitka; and that hereupon, without obeying the order of said writ, and in disregard thereof, the commander of the Sitka immediately got under way, and departed from the jurisdiction of the State of California.

It further appears that, on these facts being duly reported to the Governor of the State of California, he has communicated the same to the Executive of the United States, and asks redress in the premises, as for a public wrong to the judicial and political authorities of the State of California and of the United States.

Whereupon you submit the question, — Whether the conduct of the prize-commander of the Sitka, under these circumstances, constitutes a just cause of complaint on the part of this government, under the law of nations or any treaty between the United States and a foreign power?

This inquiry involves question of what are the condition and limits of the right of asylum in the ports of the United States, claimable at the present time, by either of the parties belligerent, — Turkey, Great Britain, France or Sardinia on the one hand, and Russia on the other hand.

That right, not being specifically regulated by any treaty between the United States and those governments, or either of them, is to be measured in this case by the general law of nations, as affording in the premises a *quasi* rule of action to the United States, standing in the attitude of impartial neutrality towards each of the great belligerent powers.

Specific points of inquiry are indicated by the grounds of illegality in the restraint of the petitioners for the writ of *habeas corpus*, which are alleged in the petition. These are:

1. Whether in general such restraint be lawful within the State of California.

2. Whether such restraint be lawful, if the Sitka came to San Francisco from a place in the possession of Great Britain.

It is fundamental that every neutral state, — by virtue of its sovereignty, — has a right to exact, and by force, if need be, that the belligerent powers shall not make use of its territory for the purposes of their war; they are not to arm nor enlist troops there; nor to exercise any act of war there; nor, in any way whatever, make it the seat of hostilities by land or sea. Kluber, Droit des Gens, § 283, 285.

This doctrine includes the consequence that no belligerent army has the right of passage through, or entry into, the neutral territory, without the consent of its sovereign. Vattel, Droit des Gens, liv. iii. ch. 7, § 120.

In rigor, this right of exclusion appertains to all the territorial waters of the neutral state. But, as the mere transit through territorial waters, or even admission into

ports, does not involve the same grave inconveniences as the transit through or entry on land, there exists a general consent to permit the former, under the reservation always that no act of hostility is to be committed by the belligerents within the waters of the neutral state. Bynkersh. Quæst. J. Pub. lib. i. cap. 8.

Whether or not a neutral nation has the right to refuse absolutely the admission of any belligerent ship into her ports, is an abstract question, which it is unnecessary to discuss here. It suffices to say that the general duties of humanity require that the belligerent be allowed to enter for the purpose of escaping from the danger of the seas, or purchasing provisions and making repairs, indispensable to the continuance of the voyage. Everything accorded beyond this must be regarded as an act of international sociability or comity, not of humanity or obligation.

Accordingly, on this point there is much diversity in the practice of the nations of Christendom. In general, the merchant-ships of belligerents are received in port by the neutrals for all purposes, whether of shelter or commerce, just as in time of peace. As to the admission of ships of war, privateers, and prizes whether made by the former or the latter, some nations are less liberal and others more, according to their own views of their interest, convenience and sovereignty. Hautefeuille, Des Droits et des Devoirs des Nations Neutres, tom. i. pp. 475, 476. Upon this part of the subject, therefore, it becomes necessary to enter into more specific explanations.

The inquiry concerns three distinct things. *First*, — Ships of war. *Secondly*, — Privateers. *Third*, — Prizes of war.

1. Of ships of war.

In the present state of the law of nations, it is universally conceded that the armed ships of a belligerent, whether men-of-war, or private armed cruisers, are to be admitted, with their prizes, into the territorial waters of a neutral for refuge, whether from chase or from the perils of the sea. That is a question of mere temporary asylum, accorded in obedience to the dictates of humanity, and to be regulated by the specific exigency.

Going beyond this, we find that the ships of war of a belligerent are generally admitted into the ports of the neutral, even when there is no exigency of humanity, but still under certain reservations. The neutral nation has perfect right so to measure the extent of the asylum thus

accorded, as to cover its own safety and retain the means of enforcing respect for its own sovereignty. Thus, in Europe, it generally happens that war is commenced between two or three of the great powers for purposes of mutual jealousy or ambition of their own, and as to which the other states are comparatively indifferent in feeling or interest, or have conflicting interests, which impel them to remain neutral in the war. But, very soon, as the burden of the war presses on one or another of the belligerents, he, having undertaken more than he can accomplish alone, seeks to persuade or compel the neutral states to join him. Or he cannot efficiently attack his enemy, without occupying the territory or the ports of some neutral state. Or, perceiving that his own commercial resources are wasting away in the war, he looks resentfully on the prosperity of some neutral state, whose commerce flourishes at his expense. Or, jealous of the intentions of a neutral state, and fearing it may join his enemy, he seeks to anticipate such an event by crippling the military forces of such neutral state. Or, finally, becoming fatally engaged in a protracted war, until it has at length degenerated into a mere wilful contest of pride and passion, the belligerent enters upon the desperate and frantic plan of starving his adversary by cutting off all neutral commerce, the very attempt to do which is an outrage on the law of nations, and can be carried out only by the perpetration of every kind of violence and fraud on the neutral nations.

We, in the United States, had ample experience of all these things, in their most exaggerated form, during the course of the reciprocally vindictive hostilities of twenty-five years, waged between Great Britain on the one hand, and republican or imperial France on the other; and, although, in the single matter of neutral rights on the sea, the maritime powers, parties to the existing war in Europe, started from a liberal point, if not of doctrine, yet of practice at least, as the progress of intelligence and of civilization required them to do, at the same time it is easy to perceive, now, a strong tendency to unjust belligerent pressure on the independent volition of neutral states, in the conduct of Great Britain and France.

As a consequence of these considerations, it is customary for neutral powers to prescribe either by treaty, or by regulations when the exigency arrives, the number or weight of metal of belligerent ships of war admissible in the neutral ports, to limit the number of such ports, to

define what anchorages shall be free, as whether within or only without the harbor fortifications, and, in other respects, to limit and regulate the privilege of asylum. Hautefeuille, tom. ii. p. 98.

A pertinent illustration of this doctrine occurs in the conduct of Denmark and Sweden in the present war. Sweden and Denmark, by reason of their proximity to the seat of war in the Baltic, and of their liability to inconvenience through the solicitude of Great Britain and France to engage them in the alliance against Russia, having determined upon strict neutrality, have seen the necessity of imposing regulations on the asylum to be accorded to belligerent ships in their ports.

Accordingly, in deciding to admit belligerent ships of war and of commerce into the ports, whether of Sweden or Norway, the Swedish government reserved to itself the faculty of interdicting to ships of war entry into the port of Stockholm inside of the fortress of Maxholm; that of Christiana, inside of the port of Kaholm; the interior basin of the military port of Horten; the ports of Carlsten and Carlskrona within the fortifications; and the port of Slito in Gothland, inside the batteries of Eneholm. See the Swedish Circular in the Post-och-Inrikes Tidninga, of January 24th, 1854.

In the same spirit, and in the exercise of the same right, Denmark has reserved to herself the faculty of interdicting to belligerents ships of war, and even to transport ships, the entry of Christiana. See letters of Mr. Torben Bille to Mr. Marcy, House Ex. Doc. 1st ses. 33d Congress, No. 103, p. 16. See also, in the same document, the letter of Mr. Sibbern to Mr. Marcy, p. 17.

2. Privateers.

As to private vessels armed to cruise in time of war, although these constitute a valuable and efficient part of the military marine, and have the same relation to national ships of war that volunteer troops on land have to the regular army, yet they are not held as equally entitled to the right of asylum, because it is generally assumed that greater respect is due to national ships, and that the officers of the latter can better be relied on for the maintenance of discipline and the prevention of disorders and abuses. Hence it is not uncommon for neutral nations wholly to exclude from their ports the privateers of the belligerent powers. Hautefeuille, tom. ii. p. 136. An illustration of this doctrine also occurs in the action of Sweden at the

present time; she having, by a decree of April 8th, 1854, not only forbidden privateers to enter her ports, but even to stay in her roads. Hosack's Rights of Neutral Commerce, p. 114; House Ex. Doc. *ut supra*, p. 20.

3. Finally, as to prizes of war, the same right exists, either to admit them, or wholly exclude them from the ports of the neutral state, according to its discretion. Hautefeuille, tom. ii. p. 155; Martens, Droit des Gens, tom. ii. p. 252.

Thus at the present time, Sweden and Denmark have each interdicted the sale of prizes in their ports, or even their entry, except in recognized cases of distress. See the letters of Mr. Sibbern and of Mr. Torben Bille, *ubi supra*.

It is to be remembered, that, in regard to prizes, as in regard to ships of war and privateers, impartiality of regulation, as between the belligerents, is requisite. Azuni, Maritime Law, vol. ii. p. 321.

But it is not material whether such regulations operate more to the benefit of one or the other belligerent powers.

Suppose, for instance, a maritime war between Great Britain and the United States: in such case, an asylum in the French ports would be no object to English vessels, but of the greatest utility to American vessels; but nevertheless, France discharges her whole duty of impartial neutrality, in admitting to her ports, on the same conditions, the vessels either of Great Britain or the United States. Hautefeuille, tom. i. p. 476.

Thus also during the present war, the right of asylum in ports of the United States may be useful to the cruisers of Great Britain and France, but not to those of Russia; and, on the other hand, to the merchant vessels of Russia, and not to those of Great Britain or France. So also the regulations of Denmark and Sweden do in fact operate only on the ships of war, privateers and prizes belonging to Great Britain and France. But this inequality of operation does not serve to change the rule of law.

But a neutral power may be so confident in its own strength, or so remote from the immediate scene of war, as not to have conceived it necessary to issue any regulation on the subject of belligerent asylum. In that case, the right of asylum is presumed; for it would be unjust for the neutral state to reject it without previous notification to the belligerent states. Vattel, l. iii. ch. 7, § 132; Wheaton, p. 471. And such, at the present time, is the relation of the United States to this question.

It must be admitted, therefore, that the British ship of war President, with her prize the Sitka, had a perfect right to enter the port of San Francisco, and remain there a reasonable time for any of the purposes compatible with the neutrality of the United States.

That being the case, it seems to me unimportant whether the President with her prize entered the port of San Francisco from a long cruise, or directly from a Russian port, or whether she had since the capture touched at a British port. No treaty, no act of Congress, no received rule of the law of nations, raises any such question. The United States might, if they pleased, exclude prizes of war from their ports either absolutely, or under qualification in favor of cases of mere distress, or previous condemnation, or non-accessibility of any port of the belligerent power itself. But the United States have not in fact done this, and the faculty of doing it is a political one, and foreign to the powers and the duties of the courts, whether of the States or of the United States.

Any officer, bearing the proper commission of his government, had as much right to enter the port of San Francisco in command of the Sitka, as if in command of the President, without its being the right or the duty of the United States to demand explanations as to her last or any previous port of departure.

It being thus demonstrated that the Sitka was rightfully within the port of San Francisco, it only remains to consider what jurisdiction, if any, the United States had over prisoners of war, if any there were, on board the Sitka.

Now, the courts of the United States have adopted, in its fullest extent, the doctrine that they have no jurisdiction to redress any supposed torts committed on the high seas, *even as against our own citizens*, by a cruiser of a foreign and friendly power, except when such cruiser has been herself guilty of a violation of our neutrality. *L'Invincible*, 1 Wheat. p. 239. There can be no question of such exception here, because the captor was a national ship of war.

Our courts have also adopted unequivocally the doctrine that a public ship of war of a foreign sovereign at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign.

This doctrine has been affirmed by us on various occa-

sions, among which is the emphatic case of a vessel, herself a prize taken from a citizen of the United States. *The Exchange*, 7 Cranch, 116. See also the case of *The Betsey*, 3 Dal. 6; *The Cassius*, Ib. 121; *The Alerta*, 9 Cranch, 359; *L'Invincible*, 2 Gal. 29; and *Guestier* v. *Hudson*, 4 Cranch, 293.

Exceptions to this doctrine exist, which exceptions constitute some of the most critical questions of public law. Ortolan, Diplomatie de la Mer, tom. ii. liv. 3, ch. 8.

Such, for instance, is the case of uncondemned prizes, which may have been captured in violation of the neutral immunity in the regard of place, or by a cruiser equipped in violation of the rights of the neutral sovereign, and are then brought within his jurisdiction, either voluntarily or by stress of weather. Wheaton, p. 471.

Here it is unnecessary to consider these exceptions, for the reason already intimated, that in the present case it is not pretended that either in manner and place of capture, or the character and equipment of the captor, there was any violation of the rights of the United States. Wheat. p. 470.

From all these premises, the consequences are inevitable in regard to the prisoners on board the Sitka. So long as they remained on board that ship, they were in the territory and jurisdiction of her sovereign. There, the neutral has no right to meddle with them. If, indeed, they be landed, then they pass from the jurisdiction of the belligerent to that of the neutral; they become practically free, because their detention is forcible, and force cannot be exercised on the neutral territory; unless, indeed, the neutral consent to their being landed, and afterwards reimbarked, as it well might, from motives of humanity, for instance, to succor the sick or wounded, without any violation of its neutrality, or any derogation from its own rights of territorial sovereignty. Hautefeuille, tom. ii. p. 157.

I conclude, for these reasons, that the courts of the State of California had no jurisdiction whatever as to these prisoners on board the Sitka.

Now, can it be affirmed that it is one's duty, at whatever inconvenience, to obey a writ issued by a court having no jurisdiction? With all due respect for courts of justice, it is impossible for me to affirm this. I cannot say that, in my opinion, it was the duty of the commander of the Sitka to remain in port to answer to the process of a

court having no jurisdiction of the matter in issue. Especially, if there was any danger of his lawful prisoners being taken away from his custody by such process, his duty to his own sovereign required him to withdraw from the circumstances creating such danger. The ship which he commanded was a part of the territory of his country; it was threatened with invasion by the local courts; and, perhaps, it was not only lawful, but highly discreet in him, to depart, and so avoid unprofitable controversy. I do not mean to say or to intimate that the issue of a writ of *habeas corpus*, in the present instance, was particularly exceptionable, at least in comparison with other cases of more obvious indiscretion in this respect, which daily occur in the United States. But, indeed, if there be anything in the practice of the courts of the States at the present time, most of all exceptionable, it is the indiscreet levity with which they issue the writ of *habeas corpus ad subjiciendum*, regardless of the old and sound rule to refuse it when the petition itself shows the absence of good cause, or that the petitioner is lawfully held by some other jurisdiction. *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Peters, 201; *Ex parte Milburn*, 9 Ib. 704. That great prerogative writ is now so cheapened by the multitude of hands to which it is committed, and by the consequent abuse of it, that it is itself rapidly degenerating into a mere abuse.

Perhaps, in due courtesy to the courts of California, the commander of the Sitka might well have made return to the writ of *habeas corpus*, if he had service of it whilst on shore. But how the service was made does not appear. And however this may have been, as, on the face of the writ, the court had no jurisdiction, it does not seem to me that his omission to make this return even, constitutes an act of such gravity, as to deserve to become the subject of complaint to his government.

I have the honor to be,

Very respectfully,

(Signed) C. CUSHING.

Hon. WILLIAM L. MARCY, *Secretary of State.*

Recent American Decisions.

District Court of the United States for the District of Massachusetts. June Term, 1855.

United States *v.* Twenty-six Diamond Rings.

Revenue law, construction of.

In a libel of information against certain goods, under the 68th section of the Revenue Collection Act, 1799, ch. 22, it is necessary for the government to prove that the goods were "concealed;" and the fact that the goods were not entered upon the manifest is not sufficient for this purpose, where there is testimony to show a contrary intent. And not entered on the manifest where goods are introduced in foreign vessels, the penalty provided in the 24th section of the same act does not attach to them. The vessel must be owned in whole or part by citizens of the United States, to make the penalty attach.

This was a libel of information filed on behalf of the Collector of the Port of Boston and Charlestown, against certain goods brought into that port by the British steamer Africa, and contained two counts; the first framed upon the 68th section of the Revenue Collection Act, 1799, ch. 22, 1 U. S. Stat. at Large, 677: "That every collector, &c., shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise, subject to duty, are concealed, and therein to search for, seize and secure any such goods, wares or merchandise; . . . . and all such goods, wares or merchandise, on which the duties shall not have been paid, or secured to be paid, shall be forfeited." And the second, upon the 24th section, 646, of the same act: "That if any goods, wares and merchandise shall be imported or brought into the United States, in any ship or vessel whatever, belonging in the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from any foreign port or place, without having a manifest or manifests on board, ... or which shall not be included or described therein, or shall not agree therewith, in every such case, the master or other person having the charge or command of such ship or vessel, shall forfeit and pay a sum of money equal to the

value of such goods not included in such manifest or manifests, and all such merchandise not included in the manifest, belonging or consigned to the master, mate, officers or crew of such ship or vessel, shall be forfeited."

B. F. Hallett, U. S. District Attorney, for libellant, cited *United States* v. *Certain Hogsheads of Molasses*, 1 Curtis, 276; *F. E. Parker*, for claimant, cited *United States* v. *Three Hundred and Fifty Chests of Tea*, 12 Wheat. 486.

The libellant's witnesses testified that when the steamer came to her moorings in Boston, and before she was made fast, the master notified the revenue officers that there had been a robbery on board, and that no passengers were to land until police officers were sent for to make a search. No notice to this effect, however, was given to passengers, though they were stopped from landing, and some of them seemed to expect a search. After the steamer was made fast, and before any passengers or baggage had landed, two of the passengers, named Salmon and Blanckensee, came to the purser, on the main deck, and one of them openly handed him a small parcel, which was afterwards found to contain twenty-six diamond rings, with the request to enter it on the ship's manifest. This was done in the presence and hearing of the revenue officer, who stepped up to the parties, told them it was too late, and seized the parcel. It was further admitted that Salmon and Blanckensee had also four large cases of jewelry on board, which were on the manifest, and were stowed with the cargo. The claimant introduced as a witness C. M. Salmon, the passenger who had charge of the rings, who testified that he left England in the Africa, pursuant to a written agreement with one Isaac Blanckensee, jeweller, of London, for the purpose of establishing his son Julius Blanckensee (his fellow-passenger), in the jewelry business at Montreal; that the four cases were shipped by Isaac Blanckensee's agent's at Liverpool, before his (Salmon's) arrival at that place, and that the twenty-six diamond rings arrived afterwards, late on the night before sailing, and the agents declined to put them on the ship's manifest, as too late; that he took them on board in his portmanteau; and being on his first absence from England, and a stranger to the usages of foreign custom-houses, he took the advice of certain fellow-passengers, whose names he gave, to whom he showed the parcel, and directed it in the saloon and in their presence to Hill, Sears & Co., Boston, and that before the vessel's arrival at the wharf he gave it to Julius Blanck-

ensee to hand to the purser, from whom the purser soon after received it. He further stated that he had never made any concealment of this parcel, and that, with all his goods, it was destined to Montreal, and was to be entered in bond at Boston.

SPRAGUE, J. — On the first count two questions arise. 1st. Were the rings, in point of fact, concealed? 2d. In order to be subject to forfeiture, should they not be *found* concealed? The first question only need now be considered.

The government witnesses testify only to the fact of the seizure; that they went on board the steamer directly upon her arrival, and soon after saw Salmon, a passenger, step up to the purser, in company with a young man, and ask the purser to put the parcel on the manifest. The officer then interfered, and said it was too late. That is the whole evidence as to the situation of the rings prior to the seizure. There is some evidence introduced for the purpose of showing a motive for the delivery on the passenger's part; to wit, that the master told the officers that a search was to be made for stolen goods, and that the passengers were to be detained on that account. But no proclamation was made, nor was anything said that was intended for the passengers. No notice was given to *them* in general, much less to Salmon and Blanckensee, in particular.

The government testimony fails to prove the concealment. The only fact proved is the open production of the rings to the purser. Where they had been before, is not stated, and no officer can say that they had not been, during the whole passage, on the captain's table.

This is a highly penal statute; the government must prove its case. It utterly fails to do so. There is ground for suspicion, but all the circumstances are consistent with innocence.

The goods were not on the manifest. For that there is a distinct count. It may be one circumstance tending to show concealment under the first count; but it goes very little way. The district attorney relies on discrediting the testimony of Salmon; and if he succeeds in discrediting it, the government still fails, on its own evidence. But I say, in justice to Mr. Salmon, that his whole statement appears to me consistent and credible.

As to the second count, I think the statute perfectly clear; that the vessel must be owned, in whole or in part,

by citizens or inhabitants of the United States. It is suggested that the word "belonging" must apply to "goods." In this case, both the goods and the vessel are foreign. But there are sound and just reasons to show that it applies to the words "ship or vessel." This regulation as to manifests is a matter of municipal law, which citizens are presumed to know. But foreigners who come within our jurisdiction for the first time, cannot be expected to know that a particular document is required by our laws; nor is it reasonable that their cargo should be forfeited for the want of such a document. Libel dismissed.

On a subsequent day, *B. F. Hallett*, district attorney, moved the court to enter a certificate (under the 89th section) that there was "reasonable cause of seizure," and cited 7 Cranch, 339. *F. E. Parker*, *contrà*, cited 16 Peters, 366; Conkling's Treatise, 317.

Sprague, J.— This is a balanced question, and I have not been without serious doubts as to the proper decision of it. The true interpretation of the words "reasonable cause" (which seem to be equivalent to "probable cause"), I think is given in the case of *Wood* v. *United States*,— "reasonable ground of presumption that the charge is, or may be, well founded," and that this was intended to qualify the less guarded interpretation put upon the words in the case of *Locke* v. *United States*, 7 Cranch, 339. There was no law that made it in the slightest degree culpable to omit the entry of the goods on the manifest; and it would seem hard to subject the importer to seizure, when no law has been violated. What are the circumstances of this case? It seems to be the custom of masters of foreign ships (though not required by law) to have a manifest of their cargo. In this instance there was a manifest, presumed to contain a list of goods subject to duty. Without some evidence that the passenger was apprised of it, this fact does not seem to bear upon him, nor to be any ground of suspicion against him. But the officer had a circumstance tending to show that the passenger was apprised of it, viz., that similar articles, belonging to the same passenger, were entered on the manifest. It was a fair presumption that the passenger knew of the entry. These diamonds, of the value of more than $1000, might be carried in the hand, and were kept by him until the vessel was in the dock, and then, some stir being made, they were brought forward to be entered on the manifest, thereby indicating that at *that time* he knew there was a manifest, and that goods ought

to be entered on it. There was another circumstance,—with the jewels was a bill of sale to Salmon himself, indicating that he was the owner, and at the time he stated that the goods were owned by a third person. Though these circumstances were afterwards explained, the discrepancy at the time, to the officer, was ground of suspicion. Under these circumstances the officer acted.

If, then, a *prior concealment* were the ground of seizure, the officer had "reasonable cause." But what concealment is sufficient? If goods were concealed, and the vessel should never come into port, the property would not be forfeited. Nor if a passenger coming on board of a ship, filled with strangers from all parts of the world, conceals his jewels for safety. Nor if he conceals them from the officers of the ship, who have no right to know of them. I have no doubt that it must be a concealment from the revenue officers; and there can be no concealment from them till the vessel is within their jurisdiction. If there had been a previous concealment, with the intent of defrauding the revenue, and the man had changed his purpose before arriving within our jurisdiction, it would not have been a concealment within the meaning of this statute, but an act preparatory thereto. In this case, soon after the revenue officer came on board, the passenger, without search, openly presented the diamonds. There was very slight ground to suspect any concealment from the officer. And if he knew of the true interpretation of the law, there would be no reasonable cause of seizure. But it is a new interpretation, and the officers may reasonably have been mistaken. *United States* v. *Riddle*, 5 Cranch, 311. I grant the certificate of "reasonable cause;" but I wish this decision to be made known; and if a second seizure be made under the same circumstances, I shall not feel bound to grant a certificate.

UNITED STATES, BY INDICTMENT, *v.* LOUIS KAZINSKI ET AL.

Indictment — Neutrality laws — Joinder of defendants — Foreign enlistment in United States.

Two or more persons charged with committing an offence in its nature several, cannot be joined in the same indictment.

It is not a crime, under the neutrality law, to leave this country with intent to enlist in foreign military service.

It is not a crime to transport persons out of the country with their own consent, who have an intention of so enlisting.

To constitute a crime under the statute, such persons must be hired or retained to go abroad with the intent of such enlisting.

THIS was an indictment for violation of the second section of what is commonly known as the Neutrality Act of 1818. 3 U. S. Statutes at Large, 447. The section reads as follows: "If any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, State, colony, district or people, as a soldier, marine or seaman, on board any vessel of war, letter of marque or privateer, any person so offending shall be deemed guilty of a high misdemeanor, and be fined not exceeding $1000, and be imprisoned not exceeding three years."

The first count of the indictment charged the defendants with having "at said district, hired and retained one William Newman and one George Smith to enlist and enter himself, as a soldier, in the service of a foreign prince, to wit, the Queen of Great Britain and Ireland."

The second count charged the defendants with having, "at Tarpaulin Cove, enlisted and entered themselves, and that each of them did then and there enlist and enter himself to go beyond the limits of the United States, to wit, to Halifax, in the British Province of Nova Scotia, as a soldier, in the service of a foreign prince, to wit, Queen of Great Britain and Ireland."

The third count was the same, with the exception of the "foreign prince, to wit, the Emperor of France."

The fourth count charges the defendants with having entered and enlisted themselves, and each of them did then and there enlist and enter himself to go beyond the limits of the United States, to wit, to Halifax, in the British Province of Nova Scotia, with intent of each of said persons, there to be enlisted and entered as a soldier in the service of a foreign prince," &c.

The fifth count charged the defendants with having "then and there retained another person, to wit, Joseph C. Vigne and one Jacob Fisher, to go beyond the limits of the United States, to wit, to Halifax, in the British Province of Nova Scotia, with intent of the said defendants, that the said Joseph and the said Fisher should be enlisted and entered as a soldier," &c.

The sixth count charged the defendants with having "retained certain other persons, to wit, Joseph C. Vigne and Edward Colavel, to go beyond the limits of the said United States, to wit, to Halifax, with intent of him, the said Joseph, and of him, the said Edward, to be there enlisted and entered as a soldier in the service of a foreign prince," &c.

The seventh count charged the defendants with having "hired and retained certain other persons then and there, whose names are unknown, to go beyond the limits of the said United States, to Halifax, with intent of them, such other persons, whose names are to the jury unknown, to be enlisted and entered in the service of a foreign prince," &c.

A motion to quash was made by counsel for defendants, on the grounds: 1st. That the second, third and fourth counts charged several distinct and separate offences, which from their nature, the defendants could be guilty of only severally; that is, each of the defendants committed a crime in enlisting himself; and there was no possibility in the nature of things that any other one of the four defendants should be guilty of the crime of the first one's enlisting or entering himself, and so on. And these counts were bad both for misjoinder of the defendants and offences. 2d. That neither of them alleged any offence within the statute, neither of said counts charging defendants with having enlisted himself as a soldier; but the second and third, charging them with enlisting to go beyond the limits of the United States, as a soldier; and the fourth, that they had entered and enlisted to go beyond the limits of the United States, with intent there to be entered and enlisted.

It was also objected to all the counts in said indictment, that they charged no crime, as the purpose of this section of the statute was to prevent only marine expeditions and enlistment for marine service; that the word "soldier" was limited by the words following: "On board a vessel of war, letter of marque or privateer." The three following sections of the same act are evidently limited to naval enlistments, and the sixth was the first section that related to land expeditions, and under that only could an offence of this kind at all be indicted.

The district attorney said he was required by the "fee bill" to join all offences and all offenders in the same indictment; that he had no discretion; where he could join, he must join both offences and offenders.

It was contended by counsel for defendants that this was merely directory, and the rights of these several defendants could not be disposed of so summarily; that the fee bill, in the first place, did not require the several offences to be in *one count* in the same indictment; that all the direction to join could mean was offences and offenders that might properly be joined by the rules of pleading.

The court held that the word "soldier" used in this section was sufficient to extend it to cases of this nature. Ordinarily the words of limitation following would qualify all the words preceding; but here "soldier" must be taken in its ordinary sense, as one enlisted to serve on land in a land army. That the fee bill was obligatory on the court, and all offences and offenders that might, under the rules of pleading, have been joined formerly, must be joined now. The only question was, whether the offences set forth in the second, third and fourth counts might, by the rules of pleading, be joined? These were offences in which but *one* could have participated. No one could be guilty of the offence of another person's enlisting himself, which was the offence in these counts charged. Each of these counts charged four persons jointly with an offence which by law is several only, and can under no circumstances be joint. These counts must be stricken out.

The district attorney then entered a *nolle prosequi* as to these counts.

The case of the government was then offered to the jury. The district attorney said that the defendants were charged with having hired or retained certain parties to go beyond the limits of the United States to be enlisted; that he should not hold himself to prove any individual case or act of such hiring or retaining, but give such evidence to the jury as would justify them in inferring such hiring or retaining. As to the word "retain" in the statute, he contended that any holding by consent or by deception, or by force, was sufficient to bring the defendants within this statute. As to the "intent" spoken of in the statute, it would be sufficient to show such intent on the part of the persons here arraigned, without showing the intent of the parties hired or retained by them. The evidence would show that some eighteen or twenty men were by various means inveigled on board a British brig, the Buffalo, at New York, under the representation that they were to be employed as laborers and mechanics at their various trades. Some were told they were to work on a railroad at Hal-

ifax; others, that they were to work on farms. That by these representations they were induced to go on board the Buffalo, in order to take them to Halifax, to enlist for the Crimea; that the whole thing was no better than kidnapping. One of these men was to go to Hartford to work at his trade as a saddler, and did not know the vessel was not bound there till two days out. Some of them doubtless understood they were to go to Halifax, and could enlist if they wished. They were all taken on board the Buffalo, and after being two days out she was obliged to put in at Tarpaulin Cove for water, where they were found and arrested by the revenue cutter James Campbell, and brought to this city.

The witnesses for the government were then called, and evidence was put in at great length, tending to show that various third parties on board the Buffalo were induced to take passage in her, and leave the limits and jurisdiction of the United States through the deception of some one, whether of these defendants it did not appear, but no connection was attempted to be made out between these defendants themselves and the parties on board, previous to their departure from New York, and no agency of these defendants was shown in such deception. After this testimony was in, the prosecuting attorney said he should at that point ask an intimation from the court as to the necessity of proving the "intent" of the persons hired and retained on board the Buffalo. He said if it was necessary to prove the "intent" of the passengers who were alleged to have been hired and retained to be enlisted, it would be necessary to show it by the testimony of other persons, for their confession would render the parties themselves, who were hired, liable to the penalties of this same act, and they could not be called to criminate themselves.

The counsel for the defence contended that it was necessary to prove "intent" of the persons alleged to have been retained to be enlisted, but that the attorney's construction of the statute was wrong. It was no crime to *be hired*, no offence against this statute, and the parties themselves who were hired were the proper persons to testify as their "intent," and this was the only testimony that could be admitted to prove it. The declarations to third persons of the persons hired would not be admissible.

The court held that third persons would not criminate themselves by testifying that they were leaving the country with the "intent" of enlisting in a foreign service; that

for the present the prosecuting attorney could proceed on the supposition that it was necessary to prove such "intent" on the part of those retained. As to the question of admissions or declarations of these third parties, it would be decided when they were offered.

The attorney then offered testimony to prove that certain passengers on the Buffalo had admitted that they intended to enlist when they got to Halifax, and said they were willing to enter the British army; that afterwards they denied the fact, and would, if placed on the stand, now deny it. It therefore became necessary to prove it by their declarations. He said he wished to introduce such testimony under the sixth and seventh counts, and under the allegation of "persons unknown." He should offer it in regard to all the seventeen on board the Buffalo as steerage passengers. He proposed to connect these defendants with the acts and declaration he offered to prove, but they were offered primarily as proof of intent of the persons hired. He said he could not prove that each knew the other's "intent," but he proposed to prove that each had the "intent" independently.

It was argued for the defence that this testimony was admissible, if at all, only as to Vigne and Colavel, and as to them only under the sixth count, where their intent was alleged. Now it was claimed to be admissible as to all the other passengers on the Buffalo, under the name of "persons unknown." Certainly every person on the Buffalo was known. Nothing in regard to their sayings and doings could be admitted under that count, and the moment the testimony was offered in regard to such passengers as persons unknown, it would appear they were known, and the proof would vary from the allegation. Take, for instance, the name of Fisher, in the fifth count. Could any of his admissions be put in under the seventh count? And yet the prosecuting attorney says the "persons unknown" are the whole seventeen. Then as to the persons named in the sixth count, their "intent" could certainly not be proved under the allegation in the seventh count, for they were evidently not persons unknown, and yet they were part of the seventeen. Then the two persons named in the sixth count are the only ones whose "intent" could be proved under the allegation in the indictment, and that only under that count. Otherwise there would be a variance between the allegations and proof.

Now as to the testimony by which it is proposed to

prove this "intent." It was proposed to prove it by admissions of third parties in regard to what had *previously* taken place, that is, as to the "intent" they had when they were hired or retained in New York. This was the only place where there was any hiring or retaining proposed to be proved, and, if admitted, only go to prove the "intent" of an offence committed, if at all, out of this district, and to prove it by declarations made after the acts of a previous "intent." Then it was admitted by the prosecuting attorney that the persons whose intent it was proposed to prove, would, if called, testify that they not only had made no such declarations, but they had no such "intent" as the declarations would seem to imply. Certainly these persons were the best witnesses to their intent. They were here,—they were in the hands of the government. There had been no evidence of any hiring by defendants while at Tarpaulin Cove, consequently any evidence of the "intent" of these third parties there would be irrelevant.

The court held that for the purpose of showing the intent with which these passengers were going to Halifax, on board the Buffalo, their declarations while on board and on their way might be given in evidence, but that this must be confined to declarations made of their intention while within this district, and that no declarations made here of prior intentions at New York could be given in evidence. And that such evidence will not affect the defendants without proof of a hiring or retaining by them within this district. The evidence offered related only to the persons named in the sixth count. Whether it was admissible under the seventh count, need not here be decided.

Evidence was then introduced of various conversations of the third parties on board the Buffalo while lying at Tarpaulin Cove, showing a willingness of such persons to go to Halifax to enlist in the British army. Defendants were not present at any of these conversations, and there was no evidence of their knowledge of them, or of the willingness of these third parties to go to enlist.

The case for the government was here closed.

Sprague, J.— The fifth count is not sufficient. It does not allege the intent of the persons hired,—this is necessary.

This second section creates three distinct offences; the second and third are coupled together. They consist in hiring or retaining another person to enlist here, or to go

without the limits of the United States with intent to be enlisted. To constitute the offence of enlisting here, it requires the consent of the party enlisting; and so also the hiring or retaining a person to go abroad with intent to be enlisted, requires assent and intent on the part of the person hired or retained.

It is to be further observed that the word retain follows the word "hire." We should not expect to find it used in a meaning opposite to that of hire, and opposite to its own usual signification. Suppose it to be used in the sense of detain, and apply it to the enlisting of men here. It at once becomes impossible. It must be used in a sense that will apply to both. The nearest term is probably "engage," and it is used like the word "retaining," when speaking of retaining counsel. It is an "engaging" of one party by the other, with the consent and understanding of both.

The next question arising is, was there any hiring or retaining within this district? The hiring and retaining here, and the intent with which they were so hired or retained, must be proved.

These parties may have been deceived and betrayed in their supposed voyage to Halifax to obtain work. If the defendants induced them to go, they are not to be excused; but they are liable in some other form, not in this, if at all. After reviewing and analyzing the evidence at length, the jury were instructed that there was not sufficient evidence to support a verdict of guilty, and they returned a verdict accordingly, and two of the defendants were discharged. Two of them were held to answer to a similar indictment. In this the point was presented of agency in obtaining these enlistments. The district attorney said he should offer evidence to prove that the defendants employed a man by the name of Kaufman to bring certain persons from New York to Boston, and that those persons, after they came to Boston, went to Halifax and enlisted, and that Kaufman aided and assisted them in so going to Halifax.

Sprague, J., held that these facts, if proved, would not be sufficient. A distinct hiring or retaining by the defendants must be shown. It might be done through agents, but these agents must be shown agents for this purpose, and acting under the defendants. There is nothing here to show these defendants were not the agents of the persons sent on here under Kaufman. They might have wished the defendants to procure them a passage, or the means of going

out of the jurisdiction to enlist. If a captain of a vessel should know that all his passengers were going out of the United States for the purpose of enlisting, or were hired or retained to go, he would not be liable,— he is as much the agent of the person hired as of the one hiring,— and he might have the knowledge and commit no offence. It would be no crime to obtain a ticket or hire a cab for the person who was hired or retained to go beyond the limits of the United States to enlist. These parties might all be countrymen, and these defendants possessing the most information, might aid the others, and go with them to obtain a passage. This was no crime. They were but the agents of the persons they were advising and assisting.

All that was offered to be proved here, was that defendants sent on one Kaufman from New York with men to go to Halifax; no proof of the intent of the persons sent on; no proof of the intent of defendants in sending them. If the agent hired them to go to Halifax, under that state of facts, as soldiers, he alone was liable. Kaufman might have made an agreement with these men to commit highway robbery if he had chosen, and in that he could not be the agent of defendants. These persons may have employed these defendants as their agent from their superior knowledge, to assist them in getting to Halifax to enlist. In such a case they would properly be said to "retain" these defendants, not these defendants them. The jury were thereupon instructed that the evidence offered would not be sufficient to support a verdict of guilty. The jury thereupon returned a verdict of not guilty, and defendants were discharged.

B. F. Hallett, for the United States; *John A. Andrew* and *Wm. L. Burt*, for defendants.

Recent English Decisions.

Judicial Committee of the Privy Council. Thursday, March 29, 1855.

THE OSTSEE.
SCHACHT *v.* OTTER.

[This is a case of international law, which will be interesting to the profession in America, as well from the principles discussed as from the hon-

orable reference which is made to some of our own most distinguished jurists. The facts sufficiently appear in the opinion of the court.]

Law of nations — Prize law — Capture of vessel without probable cause — Restitution with costs and damages — Proclamation of blockade — Capture by naval officers.

The Ostsee, a neutral ship having a cargo of wheat, coming from Cronstadt to Elsinore, was captured on 1st June in the Gulf of Finland, by Captain Otter, of her Majesty's ship Alban, as for a breach of blockade of the port of Cronstadt. The blockade was not, in fact, proclaimed until three weeks after, but some confusion seemed to have existed about it, and the captain and his admiral sent the vessel to England to be adjudicated as prize.

Held, reversing in part the decree of the Court of Admiralty, as the vessel was innocent of any misconduct, and there was no probable cause for the capture, restitution was decreed, and Captain Otter condemned in costs and damages.

In order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship or cargo, affording reasonable ground for belief, that one or both or some part of the cargo might prove upon further inquiry to be lawful prize. But what amounts to such probable cause cannot be exactly defined.

In order to subject captors to condemnation in costs and damages, it is not essential that vexatious conduct on their part be proved; for costs and damages are inflicted not as a punishment on captors, but in order to afford compensation to a party that has been injured. Nor yet will honest mistake, though occasioned by the act of the government of which they are subjects, relieve captors from liability to a foreigner and neutral for costs and damages: for captors act as the agents of the State of which they are citizens, and which State must ultimately be responsible for their acts.

The liability of a captor, who captures without probable cause, is the same whether he is a naval officer or a privateer. The question whether such an officer should be held harmless in certain cases, is one for the executive government, and not for the Prize Court.

A captor is not confined, in a Prize Court, to the case upon which the seizure was made; and a vessel sent in for adjudication on one ground, may, if the facts warrant it, be subjected to condemnation on another.

Hon. T. Pemberton Leigh.— On the 1st June, 1854, the ship Ostsee, sailing under the Mecklenburg flag, on her voyage from Cronstadt to Elsinore, was seized by her Majesty's ship Alban, under the command of Captain Otter, and sent to London for adjudication as prize. Upon the ship's papers and the examination of the master, the mate and another of the crew, on the usual interrogatories, there appeared to be no ground for condemnation, and with the consent of the captors on the 19th August, 1854, an interlocutory decree was pronounced, by which the ship and cargo were restored to the claimants, but without costs and damages. From so much of the decree as refuses costs and damages to the claimants, the present appeal is brought. It is agreed on all hands that the resti-

tution of a ship and cargo may be attended, according to the circumstances of the case, with any one of the following circumstances: first, the claimants may be ordered to pay to the captors their costs and expenses; or, secondly, the restitution may be as in this case, simple restitution, without costs or expenses or damages to either party; or, thirdly, the captors may be ordered to pay costs and damages to the claimants. These provisions seem well adapted to meet the various circumstances not ultimately affording ground of condemnation under which captures may take place. A ship may by her own misconduct have occasioned her capture; and in such a case it is very reasonable that she should indemnify the captors against the expenses which her misconduct has occasioned. Or she may be involved, with little or no fault on her part, in such suspicion as to make it the right or even the duty of a belligerent to seize her. There may be no fault either in the captor or the captured, or both may be in fault; and in such cases there may be *damnum absque injuriâ*, and no ground for anything but simple restitution. Or there may be a third case, where not only the ship is in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion. In such a case a belligerent may seize at his peril, and take the chance of something appearing on investigation to justify the capture; but if he fails in such a case, it seems very fit that he should pay the costs and damages which he has occasioned. The appellants insist that the circumstances of this case bring it within the last of these rules. The general principles applicable to this point are stated with great clearness in a document of the very highest authority,—the report made to King George the Second in 1753 by the then judge of the Admiralty Court and the law officers of the crown, one of whom was Mr. Murray (afterwards Lord Mansfield), and they are laid down in these terms: "The law of nations allows, according to the different degrees of misbehavior or suspicion, arising from the fault of the ship taken and other circumstances of the case, costs to be paid or not, to be received by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages." This passage, with others, is cited by Lord Stowell (then Sir William Scott) and Sir John Nichol in their letter to the American minister in 1794, as containing an accurate statement of the law of

maritime capture. These rules have been recognized and acted upon by all the chief maritime powers. . . . . .

The cases in the American courts fully bear out the statement of the law by Mr. Justice Story in the treatise already referred to,[1] which is in these terms: "Every capture, whether made by commissioned or noncommissioned ships, is at the peril of the captors. If they capture property without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be mulcted in costs and damages. If the vessel and cargo, or any part thereof, be good prize, they are completely justified; and although the whole property may, upon a hearing, be restored, yet if there was probable cause of capture, they are not responsible in damages." . . . . . Mr. Justice Story then proceeds to enumerate a great variety of circumstances which have been held to constitute probable cause, but all of a character to throw suspicion on the ship or cargo, and all attributable, in a greater or less degree, to some act or omission on the part of the owners. At p. 39 he lays it down generally: "If the capture is made without probable cause, the captors are liable for damages, costs and expenses to the claimants." . . . . . The law of nations upon these points appears to us to be settled by decisions both in the American and European courts. In the case of *The Charming Betsy*, in 1804, 2 Cranch, 123, the captain of an American ship of war had seized in America a vessel which was held upon the evidence to have become Danish property. The court was of opinion that the orders issued by the American government were such as might well have misled the captor; but it was decided (the judgment being delivered by a most eminent lawyer, Chief Justice Marshall), that the claimants were entitled to costs and damages against the captors (though not vindictive damages which had been awarded in the court below), and that the officer, if he had acted in obedience to orders, or had been misled by his government, must be indemnified by the State. Precisely the same doctrine, though without reference to this decision, was laid down some years afterwards by Lord Stowell, in the case of *The Actæon*, 2 Dods. 51. . . . . This judgment was pronounced by Sir William Scott in the month of April, 1815, almost at the very close of the war;

[1] Story, Treatise on Prize Law, by Pratt, cited in the argument of counsel. This work we have looked for in vain. It is not to be found in the English or American law catalogues which we have seen. We presume it to be some English collection of notes and decisions by Mr. Justice Story.

and it is in perfect conformity with the rules laid down at its commencement, in the paper already referred to, in the year 1794. The same decision, on the same grounds, was pronounced by the same learned judge immediately afterwards, in the case of *The Rufus*. It is needless to refer to all the other cases which were cited at the bar; but there is one large class which so strongly illustrates the principle, that it may be proper to advert to it. We allude to what are called the *Cape Nicola Mole* cases. In the early part of the last war, a number of French and Dutch vessels and cargoes were captured by British ships, and sent in for adjudication to the Court of Admiralty of Saint Domingo. Several of the ships and cargoes were condemned, and the proceeds of the captures distributed in the years 1797 and 1798. It was afterwards discovered that although the court of Saint Domingo was properly constituted as a Civil Court of Admiralty, and his Majesty's instructions had been addressed to it as a Prize Court, yet, by mistake, no warrant had been issued to give it a prize jurisdiction against France or Holland, although there had been a prize-warrant against Spain. Sometime afterwards some of the owners of the captured property having discovered this error, the effect of which was that the court had no jurisdiction, instituted proceedings in the High Court of Admiralty, calling upon the captors to proceed to adjudication. These proceedings were instituted nearly two years after the sentence, when the property had been distributed, the crews dispersed, the papers probably lost or destroyed, and when it was scarcely possible that the truth of the cases could be made to appear on the part of the captors. In one of these cases (*The Huldah*, 3 Rob. 236), Lord Stowell in 1801 overruled the protest of the captors against the proceedings; and in 1804, in determining a question upon the registrar's report (*The Driver*, 5 Rob. 145), he speaks of it "as one of that unfortunate class of cases in which this court has felt itself under the necessity of decreeing restitution, with costs and damages." In all these cases where restitution was ordered, we believe that on reference to the registrar's books it will be found that the captors were condemned in the costs of the proceedings in the court at Cape Nicola Mole. Surely if the absence of misconduct in the captors,— if honest error occasioned by the blunders of the government,— or the consideration of hardship upon individual officers acting in discharge of their duties, could in any case afford a protection against the claims of a

neutral, such protection would have been afforded by the circumstances of these cases. Yet the captors were held liable by the Court of Admiralty, and were afterwards, we understand, indemnified at the expense of the public. To apply, then, these rules to the facts of this case. It appears that the ship was captured on the ground of some supposed breach of blockade. The mate, on his examination, says: "I did not hear of any port or place being blockaded until the 1st June, 1854, when we were taken. When they came on board they told us there was a blockade, and asked us if we did not know it." The master says: "I did not know of any blockade whatever; I did not hear of any blockade. It is true I heard from Sir C. Napier, after the capture, that I had broken the blockade, but I did not knowingly enter or leave any blockaded port, place, river or coast. I did not hear of it except from C. Napier on the morning following the day of capture. He sent a boat for me, and I was taken on board the admiral's ship, and he told me of it." This is all that appears upon the evidence with respect to the grounds of seizure; but the papers on board the ship distinctly showed the port from which she had sailed, and that to which she was addressed; and it may not be immaterial to observe that, although some of these documents were in languages of which English seamen might well be supposed ignorant, yet the material facts are stated in an English certificate signed by the British vice-consul at Rostock. From these papers it appeared that she had sailed from Cronstadt, and was bound for Elsinore for orders. We take it for granted, therefore, that it was for a supposed breach of blockade in sailing from Cronstadt that she was seized, and this is the only ground upon which the case was rested on the argument before us. Now, in order to justify a condemnation for breach of blockade, three things must be proved: first, the existence of an actual blockade; secondly, the knowledge of the party; thirdly, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade. *The Betsy*, 1 Rob. 93. The instructions to her Majesty's commanders upon this subject for the present war are, that if any vessel shall be found coming out of any blockaded port which she shall have previously entered in breach of such blockade, or if she shall have any goods on board laden after knowledge of the blockade, such ship and goods shall be seized and sent in for adjudication. Article X. Now, when this ship

was seized, was there any reasonable ground for suspicion that she was liable to seizure under these instructions? It appeared distinctly upon her papers, as the facts upon inquiry turn out to be, that on the 25th March, 1854, before the declaration of war against Russia, this ship was on her voyage from Leith to Cronstadt; that she was on that day chartered for a voyage with a cargo of wheat from Cronstadt to England, or countries in alliance or amity with England, according to orders which she might receive at Elsinore; that on the 10th May the shipment of her cargo had been completed; and that by the 16th she had complied with all the formalities required to enable her to leave Cronstadt; and that when she was taken, she was on her direct course from that port to Elsinore. Cronstadt was not blockaded at the time she entered that port; nor at the time when she took her cargo on board; nor at the time when she left Cronstadt; nor even at the time when she was captured; nor for more than three weeks afterwards, and no blockade of Cronstadt had been proclaimed either by the British government or by the admiral. It is said that the admiral had, on the 16th April, in Kioge Bay, proclaimed an intention of blockading all Russian ports, and that certain ports in the Gulf of Finland were actually blockaded on the 28th May, and perhaps at an earlier period; but there was not the slightest ground for suspecting that this ship had left any other port than Cronstadt, or had any intention of entering any other Russian port. What color of reason, then, could there be for seizing, under such circumstances, this vessel, which did not fall under any one of the conditions which are required by the instructions to concur in order to justify sending in the ship for adjudication? It is said that there was a confusion with respect to the blockades in the Baltic, and the several Gulfs of Finland, Riga and Bothnia. But in the first place, with respect to the port of Cronstadt, we find no trace in the evidence of any confusion or doubt as to the period when the blockade commenced, and if there had been, it was a confusion created only by the acts and in the minds of her Majesty's officers, and could not, therefore, according to the principles which we have collected from the authorities, have afforded any answer to a neutral perfectly innocent of all fault, and not by any act or neglect of his, voluntary or involuntary, exposed to any suspicion. But it is said that, although there might be no ground for suspecting this ship of breach of blockade, yet

a captor is not confined to the case upon which the seizure was made, and that a vessel sent in for adjudication upon one ground, may, if the facts warrant it, be subjected to condemnation on another. Of this rule there is no doubt. Whether, when a ship is sent in for adjudication as a neutral, and there appears to be no reasonable cause for having sent her in as such, a captor can excuse himself from costs and damages by alleging irregularities in her papers, which might have led, but did not in fact lead him to doubt her neutrality, is a question which it will be time enough to consider when it arises. This question as regards noncommissioned captors is discussed, and, in our opinion, most properly decided by the learned judge of the admiralty in the case of *The Sloop Wilhelmina*, 1 Spinks, 31. In this case it is not open to doubt upon the evidence that the Ostsee was in truth a neutral ship, and nothing suspicious is found on board her. But it is said that she ought to have had on board a sea-pass from the Mecklenburg government, describing and identifying her, and that no such pass is amongst the documents produced. It is very true that no such document is found there, but, unfortunately, in this as well as in other respects, there has been some irregularity on the part of the captors. By the act 17 Vic. c. 18, it is enacted, and by her Majesty's instructions in conformity with the act, it is ordered (Art. II.) that the captor shall bring into court all books, papers, passes, sea-briefs and other documents and writings whatsoever, as shall be delivered up or found on board any captured vessels, and the captor, or one of his chief officers, or some other person who was present at the capture, and saw the said papers and writings delivered up or otherwise on board at the time of the capture, shall make oath that the said papers and writings are brought in as they were received and taken, without any fraud, addition, subduction, alteration or embezzlement whatsoever, or otherwise shall account for the same upon oath to the satisfaction of the court. It is obvious, that unless the papers are verified in the manner pointed out by these instructions, that is, by the oath of some person who saw them taken, there can be no security that the papers brought in are all the papers on board the ship. Now, in this case, neither the captor, nor any person present at the capture, nor any person who can have any personal knowledge whatever on the subject, has made the affidavit. It appears that a gentleman named Huxham, one of the officers on board of

the Duke of Wellington, the flag-ship, was sent home in charge of this vessel, and he brings in certain papers which he swears were all that were delivered to him by Captain Otter, with certain exceptions which he specifies and accounts for. On the other hand, the master, Voss, in his answer to the seventh interrogatory, states that the ship had a sea-pass on board from the Mecklenburg government, and in his answer to the twenty-eighth interrogatory, he says it was on board when he took the command of the ship, and previously thereto. Now, when it is remembered that from the nature of the case Mr. Huxham's affidavit offers no contradiction to this statement, and that the supposed absence of this paper appears to have excited no remark at the time of the capture, and to have occasioned no doubt as to the ship's neutrality, it is impossible to attribute any weight to this circumstance. We will now advert to the principal cases cited for the respondents, by which it was argued that the rules which we have stated were modified, or exceptions engrafted upon them which are sufficient to protect the captors; but in doing so we must premise, that unless the rule itself be qualified, its stringency is not affected by the circumstance that it may not always have been applied by the judge who lays it down, to cases in which those who are bound by its authority may consider that it was applicable. The application of course must depend upon the opinion of the judge in each particular case. The first case relied on was *The Betsy*, Murphy, 1 Rob. 93. There an American ship was found in the harbor of Guadaloupe, at the time when the island was captured by the British forces; there were circumstances which in the opinion of Lord Stowell threw great doubt upon the point whether she was neutral or enemies' property, and made the seizure justifiable, for the purpose of further inquiry. The learned judge, it is true, remarks that the question whether there was or not a blockade in existence when the ship entered the port was one of nicety, which had only been recently decided by the Lords of Appeal, and required more legal discrimination than could be required from military persons; but he does not appear to have rested his judgment upon that ground. The next case relied on was *The Luna*, Edw. 190, which is no doubt a strong decision; for in the case of a capture made from a neutral, under a mistaken construction by the captors of a British order in council, the learned judge not only relieved the captors from costs and damages, but gave

them their expenses out of the captured property. It must be admitted that the mistake of the captors was not an unnatural one; they thought that an order in council of April 26, 1809, which declared a strict blockade "of all ports and places under the government of France, together with the colonies, plantations and settlements in the possession of that government," extended to St. Sebastian in Spain, which was then, and had been for two years, in the possession of the French. The facts of the case are not stated in the report so fully as to enable us to form an accurate judgment of the degree of suspicion which might really attach to the ship. The question of expenses does not seem to have been argued, and Lord Stowell probably felt that he was going to the very verge of the law, for he declares that he will not allow the same indulgence in future cases. This judgment was pronounced in the year 1810, during the conflict between the French, Berlin and Milan decrees on the one hand, and the Retaliatory British Orders in Council on the other. Whatever may be thought of the particular decision, the general rule, with its modifications, is laid down five years afterwards, in the case of *The Actæon*, by the same learned judge. If, however, these cases be held to establish the principle that there may be questions of so much nicety in the construction of public documents, or the determination of unsettled points of law, as to exonerate captors from what would ordinarily be the consequence of their mistake, they will not much assist the argument of the respondents here where no questions of law of any kind appear to have existed. The other authorities mainly relied on by the respondents do not relate to disputes between belligerents and neutrals. They are either cases in which the rights of belligerents only were involved, as where captures had been made by one belligerent from another in ignorance that peace had been restored; or where no belligerent rights at all were involved, as in the captures of ships engaged in the slave trade. The rules laid down in these cases may have an indirect, but only an indirect, application to questions between belligerents and neutrals. The case of *The John*, 2 Dods. 336, was of the former class. There, a capture of an American vessel had been made by a British cruiser, in ignorance that war between Great Britain and America had ceased, and the prize having been lost by unavoidable accident, the captor was called upon for restitution. The case was one which, as

the learned judge intimates, might be provided for by the treaty of peace between the two nations, and on which, as between them, there might or might not be a claim against the British government, according to its terms, and according as the British government had or had not taken due means for giving notice of the peace to its officer; and he lays it down that the officer, being under invincible ignorance, and being in possession *bonâ fide*, was not responsible for the loss which had occurred. In another case of the same kind, *The Mentor*, 1 Rob. 153, Lord Stowell seems to have thought that, when an act of mischief was done by the king's officers, though through ignorance, it would not necessarily follow that they would be protected from civil responsibility, but that the party injured might resort to a court of prize, and that the officer must look to his own government for reimbursement. Whether all the doctrines laid down in these two cases are quite consistent with each other, may, perhaps, admit of some doubt; but they belong, as we have already observed, to a different class of cases from that which we have to decide; and if all the doctrines found in *The John* were applied to a case between neutrals and belligerents, they would afford no protection to the captors here, where there was no invincible ignorance, where everything depended on the Admiral's own acts whether he had or had not established a blockade of Cronstadt. It was then urged that the captors, having acted *bonâ fide*, ought to be indemnified by her Majesty's government, and that there are cases in which the Court of Admiralty has either made an order against the government, or has refused to make an order against the captor unless the government would undertake to indemnify him. The cases relied on for this purpose are *The Zacheman*, 5 Rob. 153, and *The St. Juan Nepomuceno*, 1 Hag. 265. In the former, the crown, having by treaty the right of pre-emption of certain goods seized as contraband, had improperly delayed to exercise such right. In the latter, the slaves, the value of which was sought to be recovered, had been liberated by the crown. In both these cases the crown either had taken or had the right to take the property, the value of which was demanded from the captors. In neither was any order made against the government, nor is it easy to see how any could have been made. But it is sufficient to say that in the case before us, no blame of any kind appears to be imputable to the government. They had contributed by no act or default of theirs to the

capture. They had not, at the time when it took place, proclaimed any blockade of Cronstadt, nor done anything to mislead the naval officers in that respect. Whether, in any case where her Majesty's naval officers may have acted wrongfully as regards neutrals, but are liable to no imputation of wilful misconduct, it may or may not be expedient, with a view to the efficiency of the navy and the interest of the public service, to indemnify such officers at the public expense against the legal consequences of their acts, must be left to the consideration of those who are entrusted with the executive authority of the crown. Sitting here judicially, we can only administer the law as we find it between the claimants and the captors. It is then said that in this case the sending in the ship must be treated as the act of the admiral, and not of Captain Otter. When a subordinate officer does an act under the immediate order of the superior officer, it may well be that the superior officer is responsible for it. The principles applicable to this subject are discussed and explained in *The Mentor*, already referred to, and *The Eleanor*, before the American courts, in 1817, reported 2 Wheat. 357. But here we are dealing with the actual captor, who demands adjudication of the ship and cargo, and who, for all purposes of this suit, must be treated as the party responsible to the claimant. With any rights or liabilities as between Captain Otter and Sir C. Napier, we have here nothing to do. It is then said that if the captors had been admitted to prove the circumstances of the capture, the case might have worn a different aspect. But the principle of the Prize Court is, that the case is in the first instance to be tried on evidence coming from the captured; and if upon such evidence no doubt arises, the property is to be restored instantly,— to use the expression of Lord Mansfield in *Lindo* v. *Rodney*, 2 Doug. 614, *velis levatis*. The liberty to enter into proof on the part of the captors is rarely granted, and is attended with great inconvenience, as is well explained by Lord Stowell in the case of *The Haabet*, 6 Rob. 54. No doubt the circumstance that the case is decided exclusively upon evidence proceeding from the claimants is deserving of great attention, when it is sought to condemn captors in costs and damages, and makes it fit that the court should look with great jealousy at the evidence, with a view to see whether there might not be reasonable ground of seizure, before it pronounces such a decree. But we can see in the case before us noth-

ing to excite any suspicion, or to induce us to think that if an application for liberty to give evidence on the part of the captors had been made in proper time, it ought to have been complied with, or if complied with, would have altered the complexion of the case. However that may be, we do not mean in any degree to affect the rules of law upon this point as they now exist. In the present case the captor was aware, before the cause came on, of the question which alone was to be discussed; if he thought his case could be bettered by further proof, and that he was entitled to give it, he should have applied for such liberty before the case was heard, and he cannot reasonably make such an application after the hearing. It is then said that there is a distinction to be made in these cases between officers of her Majesty's navy and privateers; that the court has a large discretion in such subjects, and ought not to press with severity upon men who are acting in the discharge of a difficult and important duty. That for many purposes there is a clear distinction to be made between public and private ships of war, and that there are the strongest reasons for making such distinction, can admit of no doubt; but as regards the particular rule in question, that a capture without probable or reasonable cause exposes the captors to condemnation in costs and damages, we find it laid down in the text-books and the decided cases both foreign and domestic, as applicable to captors generally, to public and private ships indifferently. In the case of *The Lively*, 1 Gal. 327, Mr. Justice Story states distinctly, "Public and private ships must be governed by the same principle." Again, as to the discretion to be exercised by the court. When the application of a rule depends on the absence or existence of misconduct in both or either of the litigants, the greater or less degree of that misconduct, the existence or absence of suspicion attaching to a particular ship or cargo, the greater or less degree of it, and the causes to which it is, in whole or in part, to be attributed, it is obvious that there must necessarily be a very large discretion left to the judge, for scarcely any two cases can, in all such respects, be precisely the same. But when once, in the opinion of the judge with whom the decision rests, a particular case is brought clearly within a particular rule, it should seem that his discretion is at an end. It is not a question merely of costs of suit, but of reparation for a wrong which, when an accidental loss has afterwards occurred, may extend to the whole value of the ship and

cargo. Nor, if we were at liberty to relax settled rules upon our own notions of justice and policy, are we quite prepared to say that we should do so in this instance. The law which we are to lay down cannot be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favor, or in favor of particular classes of its own subjects. On the law of nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all her principles of prize law from the decisions of English courts; and whatever may have been the case in former times, no authorities are now cited in English courts in cases to which they are applicable, with greater respect than those of the distinguished jurists of France and America. Whatever is held in England to justify or excuse an officer of the British navy, will be held by the tribunals of every country, both on this and the other side of the Atlantic, to justify or excuse the captors of their own nation. By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong. Is it too much to say that where no ground of suspicion can be shown, and all that the captor can allege is, that he did wrong under a mistake, he should make good in temperate damages the injury which he has occasioned? Ought a captor to be permitted to say to the captured, "True, nothing suspicious appeared in your case at the time of seizure, but, upon further inquiry, something might have been discovered. I had a right to take my chance; you have nothing to complain of. I subjected you to no unnecessary inconvenience,—go about your business, and be thankful for your escape?" We cannot think that this would be deemed a satisfactory answer to a British neutral seized by a foreign belligerent. Upon the whole, therefore, after the most anxious consideration, having sought in vain for any circumstances which could afford in this case a probable cause of capture, we cannot hold the captors exempted from all responsibility, though the damage will, in all probability, prove to be but small. The amount must be referred to the registrar in the usual way, but we shall advert to some circumstances which ought to be attended to in making the computation. No complaint is made of any vexatious conduct on the part of the captors, or of any undue delay in sending home the

vessel. London appears to have been one of the ports to which the charter-party provided that she might be sent. For any delay which may be attributable to the claimants themselves, the captors of course cannot be held responsible. The exact time of the ship's arrival in London does not appear. It was stated at the bar to have been the 26th June. On the 3d July a monition was taken out, and the ship's papers were brought in; on the 6th the monition was posted up at the Royal Exchange; and on the 7th July the examination of the witnesses *in præparatorio* was completed. It seems probable that as the ship had previously traded with this country, and one of her contemplated destinations was the east coast of England, the owners, or at all events Brockelmann, the part owner of the ship, and the sole owner of the cargo, had agents in this country. On the 10th July, at all events, the present claimant came forward and gave bail; but his claim was not consistent with the fact, for he alleged Brockelmann to be the sole owner both of the ship and cargo, omitting the other part owners of the ship, and no affidavit accompanied the claim; an amended claim and affidavit were afterwards brought in, but not till the 31st July. On the 2d August an offer was made by the captors to restore, on payment of their expenses, and no answer was returned to this till the 10th, when the claimants rejected it, expressing their hope of obtaining 2000*l.* for damages. On the 19th August the case was heard, and restitution took place. We think that three weeks at least of the delay in this case must be imputed to the claimants, and that in respect of this period no damage or demurrage must be allowed to the ship or cargo. We shall recommend that the claimants have their costs in the court below, but that no costs should be given of this appeal. We have thought it fit to enter so fully into the grounds of our decision, not only on account of the great importance of the general principles which have been brought into discussion, but out of the deference which we must always feel for any opinion of the learned judge from whom we are compelled to differ, and to whose deliberate judgment, if it were consistent with our duty to do so, we should willingly surrender our own. But this case seems to have passed without much discussion in the court below; certainly without that full examination of the principles and the authorities, both in this and foreign countries, for which we are indebted to the able arguments addressed to us from the bar. The cases

in which, during the late war, restitution was attended with costs and damages, turn out, upon inquiry, to be more numerous than was supposed. We have been guided to the conclusion at which we have arrived, by what we consider to be established principles. They appear to us to be founded both in justice and convenience, reconciling as far as possible (what it is very difficult to reconcile) the conflicting rights of belligerents and neutrals. We have adopted them, however, not upon any views of our own, but because we consider them to have been recognized and acted upon by the general consent of nations.

Decree reversed.

Queen's Bench.

Thursday, May 24, 1855.

GARDNER *v.* WALSH.

Promissory note — Alteration — Joint and several — Addition of a maker's name.

A joint and several promissory note, although it contains two promises in the alternative, is one contract, and if designedly altered in any part, so as to alter the liability of the makers, it is entirely vitiated.

If, after a note is a perfect instrument according to the intention of the parties, as the joint and several note of A. and B., and after it has been issued and negotiated, the payee, without the consent of B., cause it to be signed by C. as a joint and several maker, A. and B. are discharged from liability on the note.

Catton v. *Simpson*, 8 Ad. & Ell. 136, overruled.

ACTION by payee against the defendant as maker of a promissory note, dated 19th February, 1853, for 500*l.* with interest payable on demand.

Fifth plea, — That the note, at the time when it was made and drawn, was made and drawn by defendant and Elizabeth Burton only, as their joint and several note, and that after the same was made, drawn and issued by Elizabeth Burton, the plaintiff, without the consent of the defendant, caused the same to be altered in a material part, by causing Alice Clark to sign the same and become a joint maker thereof, and that the said alteration was not in correction of any mistake nor to further the intention of the said parties or either of them.

Replication — Traverse of the plea.

At the trial before Lord Campbell, C. J., it appeared that the note was a joint and several promissory note, and signed by Elizabeth Burton, by the defendant, and by Alice Clark; that Elizabeth Burton kept the George Inn at Stockport, which business was afterwards carried on by her mother, Alice Clark; that in February, 1853, Mrs. Burton being indebted to the plaintiff for goods supplied, the defendant was applied to, and agreed to become surety for Mrs. Burton to the plaintiff. On the 19th February, 1853, the note in question was drawn and signed, first by Elizabeth Burton, then by the defendant in the presence of the plaintiff's traveller. There was no evidence that the defendant knew that any other person was to be a maker of the note, but there was some evidence of an understanding between Mrs. Burton and plaintiff's traveller, that Alice Clark was to be a joint maker of the note. Accordingly Alice Clark afterwards, and unknown to the defendant, signed the note as a joint and several maker, at the plaintiff's request. The lord chief justice thought the fifth plea proved, and directed a verdict for the defendant thereon.

A rule *nisi* having been obtained on two grounds, first, that the plea was not proved; secondly, that the addition of Alice Clark's name did not discharge the defendant from his liability on the note.

Miller, Serjt., showed cause; *Bramwell* and *Milward*, in support of the rule.

Lord Campbell, C. J.— In this case we are all of opinion that the rule cannot be supported, on the ground that the signing of the note by Mrs. Clark did not amount to an alteration of the note, and of the liability of the defendant in a material point. Supposing the other allegations in the plea to be proved, we think there is sufficient evidence that the plaintiffs, without the consent of the defendant, caused the said note to be added to, altered and changed in a material part thereof, and in a material point, by causing the said Alice Clark to sign the same. If, after the note was a perfect instrument according to the intention of the parties, as the joint and several promissory note of the defendant and Elizabeth Burton, and after it had been completely issued and negotiated, the plaintiffs, without the consent of the defendant, had caused it to be signed by Alice Clark as a joint and several maker along with the defendant and Elizabeth Burton, according to principle and authority, he is discharged from his liability

upon it. There would be no difficulty in showing that, under certain circumstances which might have supervened, this alteration might have been prejudicial to the defendant; but we conceive he is discharged from his liability upon the altered instrument. Supposing it to be genuine, it would operate differently from the original instrument, whether the alteration be or be not material. If a promissory note, payable three months after date, were altered by the payee to six months, or be made for 100*l.* and should be altered for 50*l.*, we conceive he could not sue the maker after the alteration, either in its altered or original form. The alleged maker was no party to a note at six month's or for 100*l.*, and the note at three months, or for 50*l.*, to which he was a party, is vitiated by the alteration. This principle, which in *Pigott's case* was established in respect of a deed, was applied to negotiable instruments in *Master* v. *Miller*, and, as far as we are aware, it has been, with one exception, uniformly acted upon down to the recent case of *Burchfield* v. *Moore*, 3 El. & B. 683. The exception is *Catton* v. *Simpson*, 8 Ad. & Ell. 136. That case certainly does very nearly resemble the present. The defendant had as surety signed a joint and promissory note with the principal debtor, having no reason to suppose that any one else was to sign it; afterwards the payee, without the knowledge of the defendant, induced another person to sign it, with a view to strengthen his security, and the court held that the defendant was still liable upon it. But that decision took place merely upon the refusal of a rule to show cause why there should not have been a nonsuit, and seems to have proceeded upon the ground that as the new surety could not be liable on the note by reason of the stamp laws, the alteration operated nothing, although the counsel urged that "a note with an altered date does not bind any one to the new contract, yet the old contract is void." The judgment of the court was given without further reasons in these words: "In the absence of all authority, we shall hold that this was not an alteration of the note, but merely an addition which had no effect." With sincere respect for the learned judges who concurred in this decision, we feel bound to say, in our opinion it is contrary to the authorities, and that it is not law. The counsel for the present plaintiffs ingeniously urged that the defendant, in signing the promissory note, had entered into two contracts, — one separately, and another jointly with Elizabeth Burton, and although they were both written

upon the same piece of paper, and expressed in the same sentence, they might be treated as if they had been written on separate pieces of paper respectively signed by the defendant; and that the separate contract upon which the present action is brought, is not to be affected by the signature of Alice Clark, which made her a party to the joint contract entered into by the defendant along with Elizabeth Burton. But we must consider that a joint and several promissory note, although it contains two promises in the alternative, is one contract and one instrument, and that if it is designedly altered in any part by the payee so as to alter the liability of the maker, it is entirely vitiated. According to *Pigott's case*, if a party to a deed make an alteration in a covenant after the deed is executed, not merely the covenant, but the whole deed becomes void. But although we entertain no doubt upon this point, we do not come to the conclusion that the rule should be discharged. Looking at some of the allegations in the fifth plea, a difficulty arises with respect to the construction to be put upon them, and the evidence necessary to support them. We therefore think the proper course will be to make the rule absolute for a new trial, the defendant being confined to one plea addressed to the alleged vitiation of the note by the signature of Alice Clark, and having leave to amend that plea as he may be advised; the costs of the first trial, after deducting the costs of the issue found for the plaintiffs, to abide the event of the new trial.

Rule absolute accordingly.

Derecourt *v.* Corbishley.

Friday, June 1.

Assault and battery — False imprisonment — Justification by private person — Arrest by constable for breach of the peace, upon view and upon charge made.

Where a constable, in whose presence a breach of the peace is committed, is directed by a bystander to take the offender into custody, and he does so, the act of the constable being lawful, neither the constable nor the bystander is liable in trespass.

So *held*, on demurrer to a plea which alleged that the plaintiff committed a breach of the peace, in the presence and view of a constable, and "that thereupon defendant gave plaintiff in charge of the said policeman for the said offence, and directed him to take him in custody before a magistrate, to answer for the said offence; and that the policeman, in pursuance of the charge, *molliter manus imposuit*," &c.

Trespass. The declaration stated that the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned at a police-station.

Plea — 1. Not guilty. 2. That before the committing of the acts complained of, one John Watkins was lawfully possessed of a messuage situate within the city of London police district, and being so possessed, the plaintiff, with force and arms, and with a strong hand, into the said messuage unlawfully, violently and forcibly did enter, and from the possession of the said messuage, with a strong hand, unlawfully and violently and forcibly did expel and remove the said John Watkins, against the peace of our lady the Queen; and the plaintiff committed the said breach of the peace in the presence of one of the officers of the city of London police and a peace officer and constable of our lady the Queen, and who then had view of the said breach of the peace, which was committed within the city of London police district; and thereupon the defendant gave the plaintiff in charge of the said police officer for the said offence, and directed him to take him in custody and convey him before one of the city of London police magistrates, to answer for the said offence; and the said police officer accordingly, in pursuance of the said charge, gently laid his hand on the plaintiff and took him into custody, and for the purpose of conveying him before a city of London police magistrate, conveyed him in custody to, and imprisoned him for a short and reasonable time at the said police-station, doing no more than in duty he was bound to do, and which are the trespasses and acts complained of.

Demurrer to the second plea.

Kemplay, in support of the demurrer; *Willes*, *contrà*, was not called upon.

Lord Campbell, C. J. — This plea would have been bad upon special demurrer; but, happily, the days of special demurrer have gone by; and upon general demurrer I am of opinion that the plea is a good answer. It cannot be denied that, under the circumstances stated in the plea, the constable *proprio vigore* might have arrested the p laintiff. A breach of the peace was com mitted in his view; and "thereupon" the defendant gav e the plaintiff in charge, and the constable took him, — t hat is, the constable then and there, upon view of a breach of the peace, took the plaintiff into cu stody, as I apprehend he had a right to do,

not only to preserve the peace, but for the purpose of having the offender punished. It would be monstrous to suppose that a constable, seeing a violent assault committed in his presence, might not seize the offender and carry him before a justice, to be dealt with according to law; and the authority cited by Erle, J., is quite in point. Then, the officer having clear authority to arrest, is the defendant liable? I am clearly of opinion that he is not. No wrong has been committed. Substantially, the defendant did nothing but call upon the constable to do his duty. If he had said simply, "Constable, you see this breach of the peace; do your duty," he would not have been liable; nor is he liable because he went further, and said, "Your duty is to arrest this man, and I give him in charge." Our judgment, therefore, is for the defendant.

Coleridge, J. — I am of the same opinion. This is an action of trespass for assault and battery and false imprisonment; but an assault and battery cannot be committed by mere words; and the defendant did nothing but by words. The act complained of was done by the constable; and if it had not been justified, the defendant as well as the constable would no doubt have been responsible for it; but if the constable had refused to do the act, the mere words of the defendant would not have constituted a trespass, and no action would have lain. But what the constable did was not, in truth, an assault and battery, because it was justifiable. If a constable sees an assault and instantly takes up the offender, no wrong is done; and that is what occurred in the present case according to the reasonable understanding of the plea.

Erle, J. — The plea confesses that the defendant called upon the policeman to arrest, and avoids, by showing that the arrest was lawful. No right of the plaintiff has been violated; but he says that, though the policeman might lawfully take him, the defendant had no right to call upon the policeman to do so. Nothing but the clearest authority would ever compel me so to hold, and that position is not supported by any authority.

Judgment for defendant.

Reid *v.* Hoskins.

Action for not loading pursuant to charter-party — Plea of war declared before breach.

To an action for not loading a cargo at Odessa pursuant to charter-party, defendant pleaded that Odessa was a Russian port, and that before breach

both parties had notice of the declaration of war, that the ship was a British ship, and that defendant could not have procured or received a cargo on board without corresponding with the enemy. On demurrer: *Held*, a good plea.

This was a declaration on a charter-party, whereby it was stipulated that the vessel should proceed to Constantinople, and thence to Odessa, Kertch, or other port in the Black Sea, according to directions received at Constantinople, and at such port to load a cargo of tallow. The declaration alleged that the vessel sailed to Constantinople and thence to Odessa, according to orders; and concluded with a breach in not loading a cargo of tallow at Odessa.

Plea,—That after the said orders were given, and the said vessel proceeded from Constantinople to Odessa, and before the alleged breach of contract, war was declared and proclaimed by her Majesty Queen Victoria against the Emperor of Russia, and they then went to war, and that such war there commenced and has ever since existed and raged, and this kingdom and the empire of Russia have during the period aforesaid been at open war with one another, of which the plaintiffs and defendant before the alleged breach had notice; and that Odessa during all the time aforesaid was part of the said empire of Russia; and that the plaintiffs and defendant during all the time aforesaid were and are natural-born subjects of this kingdom, owing allegiance thereto, and not of the empire of Russia; and that the said ship was, during all the time aforesaid, a British ship, registered according to law in that behalf, and that no license from her Majesty was or could be obtained or procured for loading any cargo on board the said vessel at Odessa aforesaid; and the defendant could not, without trading and corresponding with the said enemy and his subjects, have procured a cargo or loaded the said ship as agreed, nor could the plaintiffs, without trading and corresponding with the said enemy, have received such cargo.

Demurrer thereto.

Manisty, in support of the demurrer; *Willes*, *contrà*.

Lord Campbell, C. J., now delivered the judgment of the court.[1] We are of opinion that the defendant is entitled to our judgment upon the demurrer. The plea avers that both the plaintiffs and the defendant are British subjects,—that both had notice of the war between our Queen and the Emperor of Russia before the alleged breach of

[1] Lord Campbell, C. J., Coleridge and Erle, JJ.

the charter-party; that the ship was a British registered ship, and that no license from her Majesty was obtained or could be obtained for loading any cargo in a ship that was at the port of Odessa; that the defendant could not, without corresponding with the enemy or with his subjects, have procured a cargo or loaded his said ship, nor could the plaintiffs, without corresponding with the said enemy or his subjects, have received such cargo on board. We think that the contract was dissolved before any breach of it by the defendant, as, without any previous default on his part, the performance of the contract had become impossible by the exercise of the Queen's undoubted prerogative in the declaration of war against the Emperor of Russia. The defendant in his plea appears to acquit himself of all blame,—he negatives the supposition that before the declaration of war he could have provided a cargo for the ship from Russian subjects, or that after the declaration of war it would have been possible for him to have loaded the ship without trading and corresponding with the enemy. To meet the possibility that a cargo, the property of British subjects, might be loaded in the ship after the declaration of war, there is an averment that the plaintiffs could not have received the cargo on board the ship without trading with the enemy. It is material for us to consider that the owners of the ship are British subjects; it therefore was material that the captain of the ship, as soon as there was a declaration of war, should seek a place of safety instead of remaining at Odessa for the sake of procuring a cargo, which he might safely have done if he had not been a British subject and the ship had remained there. Some observations were made by the plaintiffs' counsel, on the ground that consistently with the plea, the war might not have broken out, or the parties might not have had notice of it, until the last of the lay days or the demurrage days allowed by the charter-party for loading the vessel. But the plea alleges that the events which went to the dissolution of the contract occurred before the alleged breach of the contract, and the plaintiffs have traversed the whole of that plea. The plaintiffs will be entitled to a verdict if they can prove that by any previous default on the part of the defendant the contract had been in any respect broken before it was dissolved. In the meantime we must give judgment for the defendant on the demurrer. Judgment for defendant.

Recent Canadian Decision.

Vice-Admiralty Court — Lower Canada.

Tuesday, July 3, 1855.

The Inga.

Merchant Shipping Act, 17, 18 *Vict. c.* 104 — *Steam Navigation Act*, 14, 15 *Vict. c.* 79 — *Collision — Steamer and sailing vessel — Respective duties of.*

By the Merchant Shipping Act (17 & 18 Vict. c. 104, § 296, 297), and the Steam Navigation Act (14 & 15 Vict. c. 79), as well as by the rule of the Trinity House of Quebec, when a steamer meets a sailing vessel going free, and there is danger of collision, it is the duty of each vessel to put her helm to port and pass to the right, unless the circumstances are such as to render the following of the rule impracticable or dangerous.

The circumstances of this case examined, and no sufficient excuse being found for not following the rule, a sailing vessel condemned in damages and costs for putting her helm to starboard, and passing to the left of a steam tow-boat, thereby causing collision with the vessel in tow, the steamer and her tow coming down the channel nearly or exactly upon a line with the course of the sailing vessel.

This was a cause of collision promoted by the owners of the barque Universe, in which they claimed compensation for damage sustained by that vessel in consequence of being run into on her voyage from Montreal, on the 28th May, 1854, by a vessel called the Inga. The facts of the case sufficiently appear from the following opinion of the court:

Hon. Henry Black. — The Inga, a Norwegian vessel of about four hundred and eighty tons, had been lying in the harbor of Quebec opposite the Lower Town market-place, and in the afternoon of the 28th May, 1854, got under way for the purpose of proceeding to the ballast ground, from two to three miles up the river. The tide was ebbing, and the wind a light breeze from the eastward, and she went up under sail. Between three and four in the afternoon she had nearly reached the place at which she intended to come to anchor. She had come up under her foresail, fore-topsail and main-topsail; but having decided upon the place at which she was to anchor, her main-topsail was taken in, and she was proceeding under her fore-

sail and fore-topsail, the wind still light from the east, the tide ebbing, and the vessel having way enough to stem it, and to move past the land at the rate of from half a knot to a knot an hour. At the same time the steam tow-boat Lumber Merchant, was coming down the river from Montreal to Quebec, having the bark Universe, about three hundred and thirteen tons register, in tow astern of her, with about fifty fathoms of tow-rope. They were going six knots through the water, or about nine past the land with the tide. When the vessels came in sight of each other they were about a mile and a- half or two miles apart, all three being somewhere about the centre of the channel; the witnesses examined on the part of the Universe saying that the Inga was a little to the north, or on the port hand of the line on which the Lumber Merchant and Universe were proceeding; and the witnesses examined on the part of the Inga affirming on the contrary that the Inga was a little to the south of that line; or, in other words, that the Lumber Merchant and Universe were a little on her starboard bow. Both parties, however, agree that the vessels were nearly in a straight line. As they approached, the helm of the Inga was put astarboard, which threw her head round towards the south. The Lumber Merchant and the Universe, on the contrary, put their helms aport, which threw their heads also to the south, and the consequence was that the Lumber Merchant just cleared the Inga, leaving her on the port side; but the Universe and the Inga came into collision, the Inga's bow striking the port side of the Universe about the main rigging, doing considerable damage to both vessels. At the time of the collision, the tow-rope broke near the steamer's tow-post. The vessels were afterwards cleared, and to recover the damage sustained by the Universe the present action is brought by the Inga.

The only questions to be decided in order to ascertain whether the action is well or ill-founded, are, whether the Inga, in putting her helm astarboard, was justified by the rules and customs of navigation, or whether she ought rather to have kept her course or put her helm aport; and whether the Lumber Merchant and Universe did right in porting their helms.

The great increase of trade in the river St. Lawrence and in the inland navigation of the province, and more especially in the number of steam vessels and of vessels towed by steam vessels, renders it of great importance that

some clear and definite rule should prevail as to the course which should be adopted by such vessels when going in opposite directions, and so placed that if each continue her course there would be danger of collision. The recognized rules for sailing vessels has always been, that if both vessels have the wind fair, each vessel should port her helm so as to pass each other on the port hand; that if both vessels were close-hauled, the one on the starboard tack should keep her course and the one on the larboard tack should give way. This, as was lately very clearly remarked by the learned and able Judge Sprague, of Boston, in a judgment given by him in September last, in the case of *The Osprey*,[1] is in reality the same rule, qualified by the other perfectly well understood rule, that neither vessel is bound to port her helm, if by so doing she would either run into direct danger or would cease to be under command; for, if the vessel on the starboard tack, close-hauled, were to port her helm, she would be thrown into the wind and cease to be under command; whereas the vessel on the larboard tack, by porting her helm, goes off from the wind, and is perfectly under command. The old rule was, also, that if one vessel had the wind large or free, and the other was close-hauled, the one being close-hauled should keep her course, and the other should port her helm and give way. The reason being obviously that the close-hauled vessel would suffer much more inconvenience by giving way, and falling to leeward, than the other, which, having the wind free, could immediately regain the line on which she had been proceeding. The rule, therefore, was in substance, that vessels meeting as stated, should each port her helm, unless one of them by so doing would either run into danger, or be put to much greater inconvenience than the other.

When steamboats came to be generally used, their power of proceeding in any direction without regard to the wind, placed them always in the same condition as a vessel proceeding with the wind free, and accordingly the custom seems to have been so to regard them. On the 30th October, 1840, the Trinity House of London made a regulation, that "when steam vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port,

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[1] 7 Law Reporter, 384.

so as always to pass on the larboard side of each other. A steam vessel passing another in a narrow channel, must always keep the vessel she is passing on the larboard hand."[1] And the preamble to this rule recites that steam vessels "may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack," and that "it becomes only necessary to provide a rule for their observance when meeting other steamers or sailing vessels going large." Notwithstanding this recital, the rule does not in direct terms apply to steamers meeting sailing vessels, and it was so held by Dr. Lushington in the case of *The City of London*,[2] decided on the 24th April, 1845. But the considerations in the preamble of the rule were adopted by that learned judge as consistent with the common law, with sound reason, and with the established rules of navigation; and he held, accordingly, that a steamer should be regarded as a vessel proceeding with a fair wind, when meeting sailing vessels. The rule of the Trinity House of Quebec, made on the same subject, on the 12th April, 1850, was in spirit the same as that of the Trinity House of London; and on the 31st March, 1854, the Trinity House of Quebec passed a further regulation meeting the precise case omitted in the English rule, and directing "that sailing vessels with a fair wind, and steam vessels, when meeting within the port of Quebec, shall port their helm and draw to the starboard, passing each other on the larboard hand." This rule, as before observed, is only the application of the doctrine that steamers shall be considered as vessels having the wind fair. Between the dates of the two Quebec rules, the English Steam Navigation Act (14 & 15 Vict. c. 79) was passed,[3] and the 27th section provides that "whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel, due regard being had to the tide and the position of each vessel with respect to the dangers of the channel, and as regards sailing vessels, to the keeping of each vessel under command; and the master of any steam vessel navigating any river or narrow channel, shall

[1] See the rule, 1 W. Rob. 488. [2] 4 Notes of Cases, 40. [3] 7th August, 1851.

keep as far as practicable to that side of the fairway or mid-channel thereof which lies on the starboard side of each vessel." This rule applies to all vessels without distinction, whether impelled by steam or by sails. Each vessel is to port her helm; the only exception being when by so doing she would be brought into danger, or if a sailing vessel, the command over her will be lost. This, it is evident, is only the old rule and reasoning, thrown into a general form and made applicable to all cases. The 296th and 297th sections of the British Shipping Act, which was passed on the 10th August, 1854, and came into force on the 1st May last (17 & 18 Vic. c. 104), contains the following enactment on the subject:

"Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; and this rule shall be obeyed by all steamships and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command."

"Every steamship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steamship."

The rules here given are in substance precisely the same as before, though given in other language, and more general and perhaps more definite terms. The rule is as before, that each vessel shall port her helm, unless she would incur danger by so doing, or the command over her would be lost. The British and the Canadian rules are therefore the same, and though that portion of them which relates to the meeting of steamers and sailing vessels, does not appear to have been formally enacted in direct words until recently, yet, as we have seen, it has been always recognized and adopted as reasonable, and as consistent with the long established rules of navigation. The same rule seems to prevail in the United States, except that as

appears in the case of *The Osprey*, and the cases therein referred to, our neighbors incline to give greater extent to that portion of the old British rule which favors the vessel which would be most inconvenienced by porting her helm, and to hold that, as a steamer has greater command over her motions than a sailing vessel with a fair wind, she ought to give way to such sailing vessel; and that the latter ought to keep her course without porting her helm, leaving the duty of turning aside so as to avoid the collision solely to the steamer. I am not called upon to decide whether the English or the American interpretation of the old rule would be the best to adopt; first, because the Canadian and English rule must prevail in our waters; and secondly, because in the case before me the Inga did not keep her course, but starboarded her helm. The English rule has, however, the advantage of being more certain, and more easily remembered; and it does appear to me that there must be less danger of collision, and that the vessels can get out of each other's way in less time if both draw to starboard, by porting their helms, than if one stands still, and throws the whole burden of the movement upon the other.

I think, then, that in the present case each vessel was bound to put her helm to port, unless there were some peculiar circumstances in the case which made it dangerous so to do, or rendered a deviation from the rule necessary or justifiable. Now it appears that both the Inga and the steamer were perfectly under command, each had sufficient way to make her obey her helm immediately. By the evidence of the Inga's own people, it would seem that she was, if at all, very little to the starboard side of the steamer and her tow; so little, indeed, that the master of the Inga himself admits that it was necessary to starboard the Inga's helm in order to get sufficiently out of the line of the steamer and her tow, to enable them to pass safely on the starboard side. On the other hand, it is denied by the witnesses for the Universe, that the Inga was at all to the southward; and it is certain, from what took place, that if the Inga had ported her helm, or even, perhaps, if she had continued in her course, the collision would have been avoided; for the Inga's people say that her helm was starboarded about two minutes before the collision, and in two minutes she must clearly have run more than half the length of the Universe to the southward; and if she had been half the length of the Universe less to the southward

than she was at the time of the collision, it is equally clear that she would not have struck that ship; and if she had ported her helm she would have gone to the northward, and been still further out of danger: and even if the collision would not have been avoided, the Inga would not have been in default, and would not have been responsible for the consequences. The case is not one of a sudden *rencontre*, where there is no time for consideration; the vessels were undoubtedly seen by each other at least ten minutes before they met.[1] Neither is it a case where there was any danger to either in obeying the rule; the channel was wide enough, and both could have drawn to the starboard without risk of touching the ground or of encountering any other damage; and both were in charge of pilots who were bound to know the rules of the Trinity House and of the river. Under these circumstances I can have no hesitation in giving effect to a definite and easily observed rule, which appears extremely well adapted to insure safety; and in deciding that the collision arose from the failure of the Inga to obey it.

Stuart and *Vannovous*, for the Universe; *Edward Jones*, for the Inga.

Miscellany.

PROCEEDINGS OF THE SUFFOLK BAR ON THE DEATH OF MR. JUSTICE WILDE.

At a meeting of the members of the bar of Suffolk county, held at the Law Library on the 25th day of June, 1855, on the occasion of the death of the Hon. Samuel S. Wilde, late a Justice of the Supreme Judicial Court, the following resolutions, offered by George S. Hillard, Esq., were unanimously adopted:

The members of the Suffolk bar, having heard of the death of the Honorable Samuel Sumner Wilde, late one of the Justices of the Supreme Judicial Court, at the close of a long, honorable and useful life, in the full enjoyment of all his mental powers, and blessed with all "that should accompany old age," and being moved to express their deep and strong sense of his eminent ability as a magistrate, and great worth as a man, therefore,

Resolved, That the estimate of the judicial character, services and fame

[1] See the case of *The General Steam Navigation Company* v. *Mann*, tried before Sir Frederick Pollock, Lord Chief Baron of the Exchequer, at the summer assizes at Croydon, 1853.

of Mr. Justice Wilde, publicly expressed by this bar on the occasion of his retirement from the bench,[1] and placed on the records of the court, embodies our best considered opinions of this eminent jurist; that they are suggested and strengthened by every new recurrence to his written judgments; and every new recollection of the particular incidents and the noble aggregate of that strenuous, brilliant and upright judicial life; that better even than when our reverence and admiration followed him for the last time from these scenes which he had so long helped to illustrate, we seem to know and more fondly than then, and more proudly, as by the side of his grave to record "that the judicial labors of Mr. Justice Wilde, extending, with scarcely the indulgence of an absolute vacation, over a period of more than thirty-five years, have been performed with admirable faithfulness, and with conspicuous ability; and that they have contributed in an eminent degree to settle and enrich the jurisprudence of the Commonwealth; to invest the supreme magistracy with respect, and the law with reverence; to establish justice; restrain crime; and ascertain, vindicate and assume the civil rights and liberties of the people" That in that review of his services, virtues, qualifications and traits of personal and official character and mind, to which the occasion naturally turns our thoughts, we appreciate and record with special admiration, his exact and deep knowledge of the common law of real property, the fruit of his earliest studies under our great teachers of that learning: his later mastery of the theory and practice of equity; the rapidity as well as soundness of his perception of legal truth; the fidelity, quickness and capaciousness of his memory; the sagacity, firmness and kindness of heart, the habits of despatch, and the instantaneous command of the law, both of evidence and of principles, with which he presided over the trial by jury; his absolute and remarkable impartiality towards all the practicers before him, too just and too manly for antipathies or favoritism; and, to sum up all, his devotion to every duty of his office, which seemed to gain strength to the last hour of his judicial life, and to which all his tastes, and all his enjoyments, were kept ever subordinate.

Resolved, That the private and personal worth of this eminent magistrate was in strict harmony with his official merits, and indeed formed part of them. His bearing upon the bench indicated the man. If he loved the law, it was because by it truth and justice were vindicated and maintained. Simple in his tastes, of industrious habits, of a cheerful spirit, of warm domestic affections and strong religious faith, he never lost his interest in life, and nothing of him but his body grew old. He was frank, direct, calmly courageous, and of unalloyed simplicity; caring as little to conceal what he was, as to affect what he was not. His intellectual tastes were healthy, and his legal studies had not closed his mind to literature; so that when the burden of accustomed toil was removed, he found constant delight in the reading and discussing of good books. His long and valuable life was crowned by a serene and beautiful old age, brought to a close by natural decay, and released by a touch so gentle as to leave more of gratitude than grief in the hearts of those who stood by his side

Resolved, That a copy of these resolutions be transmitted to the family of the deceased by the secretary of this meeting.

George Bemis, *Secretary.*

Ex-Governor Tazewell in Court. — The Mayor's Court presented a scene of unusual interest yesterday. Ex-Governor Tazewell was war-

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1 For the proceedings of the Suffolk Bar on the resignation of Mr. Justice Wilde, see Law Reporter, December, 1850, p. 423.

ranted by the city inspector for an alleged nuisance on his premises. Of course the report that Mr. Tazewell would appear in court created quite a sensation in our usually quiet community, and at the appointed hour an unusual number of persons were in attendance. The venerable man came tottering into court, and the examination of witnesses was at once commenced. He conducted his own case; with the marks of eighty years upon his brow, with hands tremulous, eyes partially dimmed, and voice husky, but with a mind apparently unimpaired, the last of his generation of the bar stood up to plead his own case before a Mayor's Court.

His examination of the witnesses was carried on in a manner peculiar to himself; the skill which has earned him the title of a great luminary of the law, was still his own. Trifling as the case was (involving only a fine of $5, we believe), he gave it an interest that men of ordinary mind could not attach to cases of the highest moment. His speech to the mayor abounded in facts and analogies that none but a man of his vast information and wonderful memory could adduce, and that but few lawyers, however well read, would think of introducing in reference to a matter of so little consequence in itself. In fact, he still displayed the great legal acumen and extraordinary abilities which won him such celebrity at the bar, in our highest State courts and the Supreme Court of the United States thirty odd years ago.

John S. Lovett, Esq. argued the case for the city. The court was occupied from 11 o'clock until 4, when his honor dismissed the warrant. — *Norfolk Beacon.*

New English Judge — Justices Maule and Willes. Westminster Hall was surprised on Saturday by the announcement that Mr. Justice Maule had retired from the bench, and that Mr. Willes had been promoted to the vacant seat. The retirement was not unexpected. For three or four years the health of the learned judge had been much impaired; the labors of his office, perhaps still more the heated atmosphere of a court, were more than he could endure. He will take with him the heartiest wishes of the profession, that he may find in rest a revival of health, and live to enjoy many years of happiness and repose.

Mr. Justice Maule was distinguished for the acuteness of his intellect. He possessed to more than common extent that faculty, so useful in a judge, of rapidly discovering the real points at issue in a case and seizing them fully and comprehensively. Clearly understanding, he was enabled clearly to speak, and hence a peculiarly terse, almost epigrammatic manner of delivering his judgments, often with most apt illustration. He was indeed rather too rapid for the convenience of counsel. He saw the point at which they were driving before they saw it distinctly themselves; or at least, before they could put it into words, it was acknowledged or answered by him as if by intuition. Hence he was somewhat impatient of tedious and heavy argument, — he could not endure twaddle, and he indulged a little too freely in interlocutory dialogue and questions that were "posers" sometimes, but sometimes also inconvenient interruptions of a chain of argument which would not bear severance without risk of spoiling the whole of it. But then it must be admitted that this was never done ill-naturedly, nor with any sneer or snappishness, but with a good-humored smile, that almost made the learned and long-winded gentleman smile also, spite of his vexation; and the query was usually so apt, that it was impossible not to acknowledge that the judge was substantially right after all.

The appointment of Mr. Justice Maule's successor has produced no small amount of commentary among the lawyers, especially among the

silks over whose heads he has been lifted. The promotion, however, although departing so widely from custom, is in every way creditable to the lord chancellor. Mr. Willes is indebted for the honor he has received entirely to his personal merits. He was not thrust onward by "connections:" he was not backed by titled friends; he had not hung at the skirts of a great man and been dragged up with him; he has achieved his own fortunes; he attained the highest honors at the university; and at the bar he speedily distinguished himself by his marvellous memory for cases. He could tell you, out of book, the names and the volumes, and pages where to be found, of all the important cases on almost any subject. This is a useful faculty, for it always gives a reputation for learning, not obtained by him who remembers only the substance and decided points, but not the names of the cases. Mr. Willes's "gift," however, is not merely memory. He is a lawyer in the true meaning of the term. He can enumerate the points actually decided in any case, and apply them with singular perspicuity to new circumstances, discerning instantly their aptitude or unfitness. The present ministry have pledged themselves to administrative reform, — so far as they can, to put the right men in the right places. It is the cry of the day, and they yield to it with good grace. The appointment of a stuff gownsman, — a man comparatively young, — who had given promise of greatness, but had not achieved it, in defiance of the claims of silk and serjeantry, of patriots in the House of Commons, and family influences out of it, — is surely the practical application of the principle so lustily bawled for upon the platform, and called for by every man one meets. Yet have we seen some very enthusiastic supporters of administrative reform shaking their heads at the promotion of Mr. Willes, not as unfit, but as unusual: proving what we have before asserted, that most men, when shouting for administrative reform, mean by the right man, themselves, and by the right place, a comfortable berth. They do not mean, "Give the place to my neighbor, my friend, my equal, or my inferior, — he is the right man. No; rather than *he* should have it instead of me, give it to Lord Tom Noddy." Reader! is it not thus? — *Law Times.*

Plunket's Bon Mots. Although Plunket, as his aspect showed, was of a saturnine temperament, he was not above enjoying and even making a joke. Once, at a dinner with Dr. Magee, Archbishop of Dublin, one of the company was a pedantic collegian, who asked his host whether he had heard of the difference between Brinkley (afterwards Bishop of Cloyne) and Pond, respectively Astronomers Royal of Ireland and England. "Brinkley," said the bore, "contends that the parallax of *a* lyræ is three seconds; Pond says it is only two; and the dispute is violent." Plunket, who was one of the party, quietly remarked, "Ah, sir, it must be a very bad quarrel, *when the seconds cannot agree.*" When the Granville Ministry was formed, in 1806, Charles Kendal Bushe, suspected of being a waverer, absented himself from court, on the ground that he was *cabinet making*. The excuse transpired, and Plunket said, "Bushe will beat me at that; I am neither a *joiner* nor a *turner.*" After quitting the Common Pleas, in 1827, to take the great seal, he was told that his successors had little or nothing to do. "Well," said he, "*they're equal to it.*" He could even joke at his own expense. On his enforced retirement, in 1841, to make way for Lord Campbell, a great storm arose on the day of his successor's expected arrival; a friend said, how sick of his promotion the voyage must have made him. "Yes," said Plunket, with a sardonic smile, "but *it won't make him throw up the seals.*"

The Ostsee. — Liability of Naval Officer for Capture. The

famous case of *The Ostsee*, 25 Law Times Rep. 45, reported from the Privy Council, is a triumph of international law, — of right over might, — of the civil over the military authority. The Ostsee was a neutral ship, captured by our fleet in the Baltic, for having, as it was asserted, broken the blockade. There was a question as to the commencement of the blockade, and on that question the vessel was sent to England for adjudication. It was held by the Court of Admiralty first, and now by the Privy Council, that the vessel was innocent, and restitution was decreed. But the important part of the case is the decision that upon the circumstances condemned the captor, the captain of H. M. S., in the costs and damages; the court laying it down that, to exempt from this liability, there must be circumstances, *connected with the ship or cargo*, affording reasonable ground for belief that she was a lawful prize. The principles that regulate costs in such cases were elaborately reviewed, and the entire report deserves to be perused with great attention by our readers, as it will be *the leading case* upon the subject.—*Law Times*. See *ante*, p. 262.

Are American Lawyers as good as the English? The lawyers have many things to be proud of. They give to the country her greatest men; they produce her ablest statesmen; they command the largest influence in the legislature, because of their competency for the business of law-making; they are the electors of the elected, as every candidate for parliamentary honor very soon discovers, for without the help of the lawyers he would have little chance of success in a contested election. It is said spitefully that the best house in every country town is always occupied by the lawyer; in all public matters the lawyers are always looked to by their neighbors as the men to speak and to act; their tongues, their heads and their hands are sure to be in requisition for the general service of the community, and it is due to them to say that they are ever ready to give their assistance without other reward than the consciousness of a duty done.

Stealing no Larceny. I conclude this long rambling letter with an amusing instance I heard in Virginia of an excuse made by a negro for stealing.

"Tom," said Dick, "you've been stealing massa's turkey."

"I aint no such a thing; who say I tuk massa's turkey?"

"I say so," said Dick, "for I seed you go into de turkey-house and come out wid de turkey head sticking out ob a bag."

"Oh, well," rejoined Tom, "if you did see me, sure enuff, Dick, den I did take it; and if you wont say nuffing 'bout it, I'll give you the drumstick — dat's all dat's leff."

Dick made no promise, but the master, who had overheard the conversation, soon had the delinquent Tom before him.

"Tom," said he, "I've just heard you confess having stolen my turkey."

"Well, massa," says Tom, "since I'se cotched, I'll jest own I tuk it. I wan't going to deny it, no how."

"Now, Tom, you know I don't allow stealing on my land, and I must punish you for this."

"Pray, massa, don't let de oberseer flog me; for, massa," (a sudden thought seeming to strike him) "you haint lost nuffin if I did steal dat turkey."

"Why, you rascal, didn't you admit you had stolen and eaten it?"

"Dat's true, massa," said Tom, "yet still you haint lost nuffin."

"How's that," said his master.

"Well, you see, massa, I tuk de turkey, and I done eat it up. When

I tuk de turkey and eat it, it got to be part of me, — it went into me and made more nigger for you, massa. So you see *what you lost in turkey you made up in nigger.*"

Tom was excused for his wit. — *Corr. Missouri Paper.*

Howard's Reports. We would call the attention of our readers to the notice of Howard's Reports in our Notices of New Books. We hope its severity will be productive of a reform or of a revolution.

Notices of New Books.

Reports of Cases argued and adjudged in the Supreme Court of the United States, December Term, 1854. By Benjamin C. Howard, Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States. Vol. XVII. Boston: Little, Brown & Co. 1855.

No court in Christendom is better entitled to have its decisions creditably reported, than the Supreme Court of the United States. No people are better entitled than the people of the United States to have the decisions of their highest tribunal laid before them in a concise and intelligible form, and at a reasonably cheap rate. In these requisites, the reports of Mr. Howard are deficient, — perhaps it is justifiable to say, scandalously deficient.

The first thing that meets the eye, in opening the present volume (among those fly-leaves which the publishers of fully bound volumes should never thrust into their books), is an advertisement of a new edition of the reports of this tribunal, by one of its associate justices, Mr. Justice Curtis. This edition is to contain every case reported, and the opinions of the judges in full, with sufficient additional statements of facts. Yet it promises to reduce fifty-seven volumes to eighteen, and a cost of two hundred and seventeen dollars to fifty-four dollars. Appended to this advertisement is a certificate of approval of the plan by all the judges, except Mr. Justice Curtis himself, in which they state their belief that its execution will be "of much utility to the legal profession and to our country."

So, it seems, the profession and the country are to have two sets of reports, — one for their own benefit, and another for the emolument of the reporter and the publishers. It is a misfortune that the reporter derives his compensation chiefly from his volumes. It is for his interest to accumulate volumes, and as the number of cases cannot be increased at will, the only resource is to add to their bulk. Accordingly we see cases swelled to a size which not only adds greatly to the expense of the purchasers, but makes it quite a serious task to extract what any one needs from the mass of printed matter which no one needs. The duty of a reporter is to give the decision of the court (now always written by the judges themselves), and so much of a statement of necessary facts as the opinion does not disclose. In addition to this, it is well, in leading cases, to give the points and authorities of counsel on the losing side, and, in some cases, on both sides. Then he is expected to put the substance of the matter actually decided in marginal notes. There usually accumulates at the latter stages of a case, a mass of papers, most of which often relate to points not raised, or waived, or matters unconnected with the decision, or which

tell the same story in various forms. If the reporter does his duty, he will sift through these, reject and condense, and put into print only what is necessary. This course requires labor and some sacrifice of immediate pecuniary interests. If he wishes to save himself labor and add to his emolument, at the expense of the profession, he will print everything he can lay his hands upon. The State usually endeavors to make it for the interest of an officer to do his duty well, but where the State so contrives that neglect of duty shall secure to an officer both leisure and profit, it may pretty generally be anticipated that the public will suffer. Such has been the experience of a pretty patient public, since Wheaton left the office of reporter, through the long incubations of Peters and Howard.

The publication of Judge Curtis's edition of the reports, with the certificate to which we have referred, renders the unfitness of Mr. Howard's reports almost *res adjudicata*. If it is not strictly a closed question, we might yet safely appeal to the common and well understood opinion of the profession, and leave the subject there. But we will illustrate our meaning a little at length.

A few days ago, in the District Court for this district, in a cause of collision, the cases of *St. John* v. *Paine* and *Newton* v. *Stebbins*, in 10 Howard, were cited, and both the counsel and the judge referred to the fact that these cases occupied, one thirty pages, and the other twenty-three, with utterly unimportant matter, when the opinions, which contained all that was needed of facts, took up, in one case, six and a half pages, and in the other, two. On looking at the cases, we found not only the pleadings printed in full, but the evidence in the District Court, and the report of commissioner, going into such details as these:

Thirty empty beer barrels, at $2 each, ...	$60,00
Two beer barrels, partly full, $2 "	4.00
Thirty-two beer barrels, 25 cents "	8.00
Articles belonging to Augustus Norton, estimating his quadrant at $16, ...	123.00
Cash in his trunk, ...	10.00

In the same volume is a case (*Missouri* v. *Iowa*) in which fifty pages are filled with the reports of surveyors, including the most minute geometrical calculations, on which there was neither argument of counsel nor opinion of the court. We wish it understood that we have made no search for cases of this description. We mention these because they happen to have come under our observation incidentally. In these three cases, in one volume, a good reporter would have reduced one hundred and six pages to twelve or fifteen.

In the multiplicity of reports at the present time, lawyers must rely a good deal upon digests, and it is known that digests are made up very much from the indexes of the reports. Whenever, therefore, we see a poor index to a volume of reports, we feel that the source of knowledge is corrupted at the head. The indexes to Howard's Reports are poor, perhaps as poor as those of Peters, which have generally been considered the standard of incorrectness. In the index to the present volume (the 17th), we find the case of *Iasigi* v. *Brown* put under the head of Absent Party, when there is nothing about absent parties in the case. *Raymond* v. *Tyson* is an important case on the law of maritime liens for freight and of the abandonment of such liens, as administered in the admiralty; yet the case is not to be found under the titles of Lien, Freight, Shipping or Admiralty. The case of *Boston* v. *Lecraw* is not to be found under the heads of Flats, Tide-Waters, Riparian Ownership, Sea and Sea Shore, or any other usual and probable head, but under the title Littoral Proprie-

tors, a title not to be found in the United States Digest, or in Angell's treatise on the subject of the suit. In *Hays* v. *Pacific Steam Ship Co.* it is gravely stated in the index, as a point decided in the case, that a vessel must have the name of her port printed in large letters on her stern. The only point decided was one of conflict of laws of States, on the taxation of vessels regularly trading between them.

In *United States* v. *Seaman*, the court is indexed as deciding, under the title of JURISDICTION. "11. In 1854, Beverly Tucker was printer to the Senate, and O. A. P. Nicholson, printer to the House of Representatives." So, under the title of PATENT RIGHTS, "3. Courts will not allow corporations to escape from their proper responsibility, by means of any disguise."

Let any one who desires to see a curiosity in the making of marginal notes, look over the marginal notes of *Shields* v. *Barrow*, p. 13, and of *Peck* v. *Sanderson*, p. 178. In the "Passenger Cases," 7 Howard, 283, is the following marginal note. "Inasmuch as there was no opinion of the court, as a court, the reporter refers the reader to the opinions of the judges for the explanation of the statutes, and the points on which they conflicted with the constitution and laws of the United States," and the reader is left to hunt out the points through about three hundred pages. The marginal note to the leading case of *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, in 6 How. 344, contains no information whatever beyond the fact of the affirmance of the decree of the court below.

The entitling of the reports of admiralty cases *in rem*, is particularly neglected or misunderstood by the reporter. The cases we have referred to, of *Newton* v. *Stebbins* and *St. John* v. *Paine*, in 10 Howard, and *Lawrence* v. *Minturn*, *Raymond* v. *Tyson*, and *Hays* v. *Pacific Steam Ship Co.*, in the present volume, are suits *in rem*, yet they are entitled as suits *in personam*. This is not only unscientific, but inconvenient and misleading. In the case of *Peck* v. *Sanderson*, p. 178, it is impossible to discover, from anything in the marginal note or text, whether the suit was *in rem* or *in personam*. Indeed, the reporter's notion of the relations of parties in admiralty suits we infer to be a little obscure, from the statement of facts in the case of *The John Jay*, p. 399, where he states that *the appeal was a libel filed by the appellants of the steamboat John Jay*.

Another evil in these reports is the great length at which the arguments of counsel are given. In some cases, it is well to print the points and authorities on the losing side, that we may know against what the decision was given. The cases are few which require the printing of points and authorities on both sides. In most instances, the opinion of the court contains all the bar desires to know: and the cases are still fewer which justify printing full arguments. Yet in these volumes, the reporter seems to print the entire briefs, with little or no attempt at condensation or selection.

It is due to Mr. Howard to say that in this last volume, with the exception of the arguments of counsel, there are much fewer instances of the swelling of cases by the printing of useless matter, and the average length of the extracts from the records is reasonable. We think we see in this, already, the shadow of Judge Curtis's announcement cast before. But from what we have seen of the reporter's attempts at giving condensed statements of facts, we hardly know which is the greater evil, to buy and read all the pleadings, and ascertain the few necessary facts for ourselves, or to trust to the labor of the reporter.

REPORTS OF DECISIONS IN CRIMINAL CASES made at Term, at Chambers and in the Courts of Oyer and Terminer of the State of New York.

By AMASA J. PARKER, LL. D., one of the Justices of the Supreme Court. Vol. I. Albany: Gould, Banks & Co. New York: Banks, Gould & Co. 1855.

We are glad to notice a new volume of reports of criminal cases in this country. Hitherto books of this character have been rare, and the practitioner and the student have been obliged to resort to the reports at large in order to obtain the learning and the authorities requisite for practice in the criminal law. The volume now before us appears to be well edited, and to contain a valuable collection of cases.

In the case of *Baron* v. *The People* it was held, in 1851, that an accessory cannot be tried before the trial and conviction of his principal. This is undoubtedly the common law. But is it not time that in such a State as New York, it should be altered by statute? The law was once the same in Massachusetts, and it was only changed in consequence of the difficulty that was experienced in the celebrated case of the Knapps, for murder, who very nearly escaped, and were only reached by straining the rule of law as to constructive presence to its utmost extent, because the actual perpetrator of the murder had avoided trial by suicide.

There are in this volume two interesting cases relating to fugitives.

One, *Kirk's case*, p. 67, occurred in 1846, before the passage of the fugitive slave law of 1850. It is decided that a fugitive slave can only be retaken on the demand of his owner or his agent, and that the master of a vessel on board which a fugitive had secreted himself, cannot recapture him on his own motion for the purpose of carrying him back, and that a statute of New York allowing a master in such a case to arrest a fugitive and carry him before the mayor to obtain a warrant for his removal, is contrary to the constitution of the United States.

The other case, that of *Joseph Belt*, p. 169, occurring also before the passage of the fugitive slave law, shows also the tendency of the State court in favor of personal liberty, and the strict conformity to the provisions of the law which will be required from the claimant of a fugitive.

We have not time or space to go into a further examination of this volume, but would say in general that its contents appear to be interesting and valuable to members of the profession, and that we shall look with pleasure for the subsequent volumes which the author intimates his intention to publish.

A MONOGRAPH ON MENTAL UNSOUNDNESS. By FRANCIS WHARTON. Philadelphia: Kay & Brother. 1855.

This volume contains the first book of a Treatise on Medical Jurisprudence in course of publication by Mr. Wharton, who is well known to the American bar as an able law-writer; it consists of two hundred and twenty-eight octavo pages, in two chapters, and is well printed. Chapter first treats of mental unsoundness in its legal relations; chapter second treats of it psychologically; and under these two heads, with appropriate subdivisions, Mr. Wharton has exhibited the leading results of law and science, as applied by the courts to insanity. The first chapter is the most valuable; the second chapter is a little gossipy in a scientific way. The whole subject, however, is an exceedingly interesting one; and Mr. Wharton will deserve the thanks of the profession for his labors in this branch of jurisprudence.

What is the legal effect of insanity, in its numerous and shadowy degrees, upon a man's civil and criminal acts, is a practical question of constant occurrence; and the difficulty of a correct decision is equalled only by its importance.

Mr. Wharton does not believe in any universal test of insanity applicable to all cases; but he maintains that medical science should be considered as a part of the common law of the land when applied to cases of insanity; and he argues that most cases of insanity not congenital or the result of accident, spring from prior vicious indulgence, or other causes which the patient might have averted, if he had so chosen; and that in all such cases, there is consequently some degree of responsibility, which authorizes punishment, restraint, correction or reform, as the special facts of each case may require. This, we think, is the true doctrine upon this important subject. It is clear that the laws of the land when vigorously executed in the spirit of justice and humanity, are as efficacious in keeping men sane in their individual actions, as the laws of nature itself; for no sooner is the invisible but wholesome power of law removed from the human mind, than it instantly tends to run mad with a will.

Mr. Wharton's subject deserves a thorough criticism, and we hope to recur to it hereafter; in the meantime we would recommend his book to not only the legal and medical professions, but the reading public generally.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Barnes, Eda P.	Marlboro',	July 3, 1855,	John W. Bacon.
Brown, Charles L.	Lowell,	" 5,	Isaac S. Morse.
Carr, Abraham B.	Charlestown,	" 10,	John W. Bacon.
Chilson, Hiram C.	Mendon,	" 31,	T. G. Kent.
Darracott, George Jr.	Lowell,	" 21,	Isaac S. Morse.
Dennison, Gurdon E.	Boston,	" 28,	Isaac Ames.
Fairbanks, Albert *	Blackstone,	" 3,	Alexander H. Bullock.
Fanning, David H. †	Clinton,	" 19,	Alexander H. Bullock.
Fish, Rufus A.	Worcester,	" 28,	T. G. Kent.
Gamage, Gideon L.	Lynn,	" 31,	John G. King.
Gardner, Reuben ‡	Goshen,	" 2,	H. H. Chilson.
Gookin, Nathaniel	Charlestown,	" 30,	John W. Bacon.
Heath, L. J.	Longmeadow,	" 18,	James G. Allen.
Howe, George E.	North Brookfield,	" 19,	Alexander H. Bullock.
Hurd, George W.	Lowell,	" 5,	Isaac S. Morse.
Johnson, P. J.	Waltham,	" 10,	John W. Bacon.
Jones, William	Ashland,	" 9,	John W. Bacon.
Kendall, Stephen B.	Boston,	" 18,	John M. Williams.
Knowles, Charles H.	Lowell,	" 10,	Isaac S. Morse.
Lawrence, Oliver F.	Shirley,	" 5,	John W. Bacon.
Mason, Nicholas	Roxbury,	" 27,	Isaac Ames.
Messinger, Charles A.*	Blackstone,	" 3,	Alexander H. Bullock.
Moore, George W. †	Clinton,	" 19,	Alexander H. Bullock.
Orcutt, Ephraim	Boston,	" 14,	John M. Williams.
Pratt, John B.	Worcester,	" 7,	Alexander H. Bullock.
Prescott, Harrison	Cambridge,	" 17,	Isaac Ames.
Ranney, Samuel ‡	Goshen,	" 2,	H. H. Chilson.
Rogers, Josiah	Boston,	" 13,	Isaac Ames.
Sherman, Jacob	Boston,	" 3,	Isaac Ames.
Shumway, Joseph H.	Adams,	" 26,	Shepherd Thayer.
Treadway, Edward	Charlestown,	" 10,	John W. Bacon.
Washburn, Hiram	Salem,	" 23,	Isaac Ames.
Weir, Robert	Boston,	" 6,	Isaac Ames.

* Fairbanks & Messinger.

† Fanning & Moore.

‡ Ranney & Gardner.